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No.

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ANGEL MCCLARY RAICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15481

ANGEL MCCLARY RAICH; DIANE MONSON; JOHN DOE, NUMBER ONE; JOHN DOE, NUMBER TWO, PLAINTIFFS-APPELLANTS

v.

JOHN ASHCROFT, ATTORNEY GENERAL, AS UNITED STATES ATTORNEY GENERAL; ASA HUTCHINSON, AS ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, DEFENDANTS-APPELLEES

Argued and Submitted Oct. 7, 2003
Filed Dec. 16, 2003

OPINION

PREGERSON, Circuit Judge:

Two of the appellants, Angel McClary Raich and Diane Monson, are seriously ill Californians who use marijuana for medical purposes on the recommendation of their doctors. Such use is legal under California's Compassionate Use Act. Monson grows her own medical marijuana. The remaining two appellants, John Doe Number One and John Doe Number Two, assist Raich in growing her marijuana. On October 9, 2002, the appellants filed suit against John Ashcroft, the

Attorney General of the United States, and Asa Hutchinson, the Administrator of the Drug Enforcement Administration, seeking injunctive and declaratory relief based on the alleged unconstitutionality of the federal Controlled Substances Act. The appellants also seek a declaration that the medical necessity defense precludes enforcement of that act against them.

On March 5, 2003, the district court denied the appellants' motion for a preliminary injunction because the appellants had not established a sufficient likelihood of success on the merits. That ruling is now before us.

FACTUAL AND PROCEDURAL HISTORY

A. *Statutory Scheme*

1. *The Controlled Substances Act*

Congress enacted the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, ("CSA") as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236. The CSA establishes five "schedules" of certain drugs and other substances and designates these items "controlled substances." 21 U.S.C. §§ 802(6), 812(a). Marijuana is a schedule I controlled substance. *Id.* § 812(c). For a drug or other substance to be designated a schedule I controlled substance, it must be found (1) that the substance "has a high potential for abuse"; (2) that the substance "has no currently accepted medical use in treatment in the United States"; and (3) that there is "a lack of accepted safety for use of the drug or other substance under medical supervision." *Id.* at § 812(b)(1). The CSA sets forth procedures by which the schedules may be modified. *Id.* at § 811(a).

Among other things, the CSA makes it unlawful to knowingly or intentionally "manufacture, distribute, or

dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as provided for in the statute. 21 U.S.C. § 841(a)(1). Possession of a controlled substance, except as authorized under the CSA, is also unlawful. *Id.* § 844(a).

Congress set forth certain findings and declarations in the CSA, the most relevant of which are as follows:

> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
>
> . . . .
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
>
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, is it not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
>
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

21 U.S.C. § 801.

2. *California's Compassionate Use Act of 1996*

In 1996, California voters passed Proposition 215, which is codified as the Compassionate Use Act of 1996 ("Compassionate Use Act"), Cal. Health & Safety Code § 11362.5. Among other purposes, the Compassionate Use Act is intended

> [t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

Id. § 11362.5(b)(1)(A). The Compassionate Use Act is also intended "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." *Id.* § 11362.5(b)(1)(B). To these ends, the Compassionate Use Act exempts "a patient, or [ ] a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician" from certain other California code sections that make possession or cultivation of marijuana illegal. *Id.* § 11362.5(d).

B. *Factual Background*

Appellants Angel McClary Raich and Diane Monson (the "patient-appellants") are California citizens who currently use marijuana as a medical treatment. Appellant Raich has been diagnosed with more than ten

serious medical conditions, including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms. Her doctor states that these symptoms are caused by a degenerative disease of the spine.

Raich has been using marijuana as a medication for over five years, every two waking hours of every day. Her doctor contends that Raich has tried essentially all other legal alternatives and all are either ineffective or result in intolerable side effects; her doctor has provided a list of thirty-five medications that fall into the latter category alone. Raich's doctor states that foregoing marijuana treatment may be fatal. Monson has been using marijuana as a medication since 1999. Monson's doctor also contends that alternative medications have been tried and are either ineffective or produce intolerable side effects. As the district court put it: "Traditional medicine has utterly failed these women. . . ."

Appellant Monson cultivates her own marijuana. Raich is unable to cultivate her own. Instead, her two caregivers, appellants John Doe Number One and John Doe Number Two, grow it for her. These caregivers provide Raich with her marijuana free of charge. They have sued anonymously in order to protect Raich's supply of medical marijuana. In growing marijuana for Raich, they allegedly use only soil, water, nutrients, growing equipment, supplies and lumber originating from or manufactured within California. Although these caregivers cultivate marijuana for Raich, she processes some of the marijuana into cannabis oils, balm, and foods.

On August 15, 2002, deputies from the Butte County Sheriff's Department and agents from the Drug Enforcement Agency ("DEA") came to Monson's home. The sheriff's deputies concluded that Monson's use of marijuana was legal under the Compassionate Use Act. However, after a three-hour standoff involving the Butte County District Attorney and the United States Attorney for the Eastern District of California, the DEA agents seized and destroyed Monson's six cannabis plants.

C. *Procedural History*

Fearing raids in the future and the prospect of being deprived of medicinal marijuana, the appellants sued the United States Attorney General John Ashcroft and the Administrator of the DEA Asa Hutchison on October 9, 2002. Their suit seeks declaratory relief and preliminary and permanent injunctive relief. They seek a declaration that the CSA is unconstitutional to the extent it purports to prevent them from possessing, obtaining, manufacturing, or providing cannabis for medical use. The appellants also seek a declaration that the doctrine of medical necessity precludes enforcement of the CSA to prevent Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use.

On March 5, 2003, the district court denied the appellants' motion for a preliminary injunction. The district court found that, "despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them," the appellants had not established the required "'irreducible minimum' of a likelihood of success on the merits under the law of this Circuit. . . ." The appellants filed a timely notice of appeal on

March 12, 2003. We have jurisdiction to hear this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).[1]

STANDARD OF REVIEW

A district court's order regarding preliminary injunctive relief is subject to limited review. *United States* v. *Peninsula Communications, Inc.*, 287 F.3d 832, 839 (9th Cir. 2002). The grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Id.* The legal premises underlying a preliminary injunction are reviewed *de novo*. *See A &*

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[1] As a threshold matter, the dissent questions the justiciability of this case. The dissent states that the plaintiffs "allege three instances of injury in their prayer for relief" and believes that two of these "injuries" are not ripe for review. The dissent essentially concedes, however, that based on the threat of future seizure of their plants, the plaintiffs have standing and their claims are ripe. This is all that is required for the plaintiffs to challenge the constitutionality of the CSA as applied to them. Once the plaintiffs have established standing on their claim that challenges the constitutionality of the CSA as applied to them, they are entitled to any appropriate *remedies* that necessarily follow from demonstrating the likelihood of success on that claim of unconstitutionality. The remedies sought are not properly understood as separate "injuries." All of the relief sought by the plaintiffs necessarily follows from the claim—the challenge to the constitutionality of the CSA as-applied—for which they undisputedly have standing and which is clearly ripe. This result is completely consistent with the case or controversy requirement of Article III. *See California Pro-Life Council, Inc.* v. *Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003) (noting that, whether characterized as a question of standing or ripeness, "we ask whether there exists a constitutional case or controversy and whether the issues presented are definite and concrete, not hypothetical and abstract." (quotation marks omitted)).

M Records, Inc. v. *Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002); *Foti* v. *City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998) ("Although we review a district court's decision to deny a motion for a preliminary injunction for an abuse of discretion, we review the legal issues underlying the district court's decision de novo." (citations omitted)).

ANALYSIS

The traditional test for granting preliminary injunctive relief requires the applicant to demonstrate: (1) a likelihood of success on the merits; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting an injunction. *See Dollar Rent A Car of Wash., Inc.* v. *Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985); *see also* SCHWARZER, TASHIMA & WAGSTAFFE, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL, ¶ 13:44 at 13-15 (The Rutter Group 2003).

Our court also uses an alternative test that requires the applicant to demonstrate either: a combination of probable success on the merits and the possibility of irreparable injury; or serious questions going to the merits and that the balance of hardships tips sharply in the applicant's favor. *See First Brands Corp.* v. *Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir. 1987). These two tests are not inconsistent. Rather, they represent a continuum of equitable discretion, whereby "the greater the relative hardship to the moving party, the less probability of success must be shown." *Nat'l Ctr. for Immigrants Rights, Inc.* v. *INS*, 743 F.2d 1365, 1369 (9th Cir. 1984).

A. *The Merits of the Appellants' Case*

Congress passed the CSA based on its authority under the Commerce Clause of the Constitution. The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3. The appellants argue that the Commerce Clause cannot support the exercise of federal authority over the appellants' activities. The Supreme Court expressly reserved this issue in its recent decision, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 n.7, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) ("Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause."). We find that the appellants have demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority. We decline to reach the appellants' other arguments, which are based on the principles of federalism embodied in the Tenth Amendment, the appellants' alleged fundamental rights under the Fifth and Ninth Amendments, and the doctrine of medical necessity.

1. *Defining the Class of Activities*

The district court found that the Commerce Clause supports the application of the CSA to the appellants. Indeed, we have upheld the CSA in the face of past Commerce Clause challenges. *See United States* v. *Bramble*, 103 F.3d 1475, 1479-80 (9th Cir. 1996); *United States* v. *Tisor*, 96 F.3d 370, 375 (9th Cir. 1996); *United States* v. *Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996); *United States* v. *Visman*, 919 F.2d 1390, 1393 (9th Cir.

1990); *United States* v. *Montes-Zarate*, 552 F.2d 1330, 1331 (9th Cir. 1977); *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972). But none of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes.

In arguing that these cases should govern here and should foreclose the appellants' Commerce Clause challenge, the appellees correctly note that "'where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *United States* v. *Lopez*, 514 U.S. 549, 558, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968) (first emphasis added in *Lopez*)). In *Visman*, we upheld the CSA on Commerce Clause grounds and restated this principle: "'Where the *class of activities* is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the *class*.'" 919 F.2d at 1393 (quoting *Perez* v. *United States*, 402 U.S. 146, 154, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971)) (emphasis by *Visman*; quotation marks omitted).[2]

But here the appellants are not only claiming that their activities do not have the same effect on interstate commerce as activities in other cases where the CSA has been upheld. Rather, they contend that, whereas

[2] *Visman* upheld the application of the CSA to the intrastate criminal cultivation of marijuana plants found rooted in soil but intended for sale. *See* 919 F.2d at 1392-93.

the earlier cases concerned drug *trafficking*, the appellants' conduct constitutes a *separate and distinct class of activities*: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law.

Clearly, the way in which the activity or class of activities is defined is critical. We find that the appellants' class of activities—the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician—is, in fact, different in kind from drug trafficking. For instance, concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation. Further, the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse. Moreover, this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.

A narrow categorization of the appellants' activity is supported by our recent decision in *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003). In *McCoy*, we held that 18 U.S.C. § 2252(a)(4)(B), a statute purportedly prohibiting the possession of child pornography, was unconstitutional as applied to intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use, including the exchange of the

prohibited material for other prohibited material. *See McCoy*, 323 F.3d at 1115. *McCoy* involved a photograph taken at home of a mother and daughter with their genital areas exposed. *Id.* at 1115. The photograph never entered into and was never intended for interstate or foreign commerce. *Id.* at 1132. The dissent in *McCoy* argued that the majority had engaged in an impermissible as-applied analysis, that the activity fell within the language of the statute, and that the majority was attempting to excise a particular act as trivial. *See id.* at 1134, 1140-41 (Trott, J., dissenting). The majority held that the conduct at issue in *McCoy* represents a "substantial portion" of the conduct covered by the relevant statute and therefore can be considered a *separate class of activity*. *Id.* at 1132.

Under *McCoy*, the *class of activities* at issue in this case can properly be defined as the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. This class of activities does not involve sale, exchange, or distribution. As was the case in *McCoy*, the class of activities here represents a substantial portion of the conduct covered by the statute—at the time of the motion for a preliminary injunction, Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington had passed laws permitting cultivation and use of marijuana for medical purposes. *See McCoy*, 323 F.3d at 1132 ("This class of activity represents a substantial portion of the conduct covered by [the statute].").

2. *Substantial Effect on Interstate Commerce*

We must now answer the question whether this class of activities has an effect on interstate commerce sufficient to make it subject to federal regulation under

the Commerce Clause. *See Visman*, 919 F.2d at 1392 ("In *Perez* . . . the Court ruled that the defendants' local, illegal activity of loan sharking was within a 'class of activity' that adversely affected interstate commerce and Congress had the power to regulate it."). In two recent Commerce Clause decisions, the Supreme Court has refined Commerce Clause analysis. In *Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Court struck down the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of power under the Commerce Clause. *Lopez* set forth three categories of activity that Congress may properly regulate under the Commerce Clause: the "use of the channels of interstate commerce"; the "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." 514 U.S. at 558-59, 115 S. Ct. 1624 (citations omitted). This case involves the third category of activity.

In *United States* v. *Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), the Supreme Court clarified Commerce Clause analysis under this third category. In that case, the Court held that the Violence Against Women Act was an invalid exercise of federal power under the Commerce Clause. 529 U.S. at 627, 120 S. Ct. 1740. *Morrison* established a controlling four-factor test for determining whether a regulated activity "substantially affects" interstate commerce: (1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any "express jurisdictional element that might limit its reach to a discrete set" of cases; (3) whether the statute

or its legislative history contains "express congressional findings" regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated." *Morrison*, 529 U.S. at 610-12, 120 S. Ct. 1740; *see also McCoy*, 323 F.3d at 1119. The first and the fourth factors are the most important. *McCoy*, 323 F.3d at 1119.

a. *Whether the Statute Regulates Commerce or Any Sort of Economic Enterprise*

As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity. Lacking sale, exchange or distribution, the activity does not possess the essential elements of commerce. *See* BLACK'S LAW DICTIONARY (7th ed. 1999) ("commerce": "The exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.").[3]

On this point, the instant case is again analogous to *McCoy*. The *McCoy* court concluded "that simple intrastate possession is not, by itself, either commercial or economic in nature, that a 'home-grown' picture of a child taken and maintained for personal use is not a fungible product, and that there is no economic

[3] Although the Doe appellants are providing marijuana to Raich, there is no "exchange" sufficient to make such activity commercial in character. As Raich states in her declaration: "My caregivers grow my medicine specifically for me. They do not charge me, nor do we trade anything. They grow my medicine and give it to me free of charge."

connection—supply and demand or otherwise—between possession of such a picture and the national multi-million dollar commercial pornography industry." *Id.* at 1131.

As the photograph in *McCoy* stood in contrast to the commercial nature of the larger child pornography industry, so does the medicinal marijuana use at issue in this case stand in contrast to the larger illicit drug trafficking industry. And it is the commercial nature of drug trafficking activities that has formed the basis of prior Ninth Circuit decisions upholding the CSA on Commerce Clause grounds. *See, e.g., Tisor*, 96 F.3d at 375 ("Intrastate *distribution* and *sale* of methamphetamine are commercial activities. The challenged laws are part of a wider regulatory scheme criminalizing interstate and intrastate *commerce* in drugs." (emphasis added)); *Kim*, 94 F.3d at 1250 ("After *Lopez*, we again acknowledged that *drug trafficking* affects interstate commerce." (emphasis added)).

The parties debate whether the "aggregation principle" of *Wickard* v. *Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), should be employed, presumably to support a finding that the cumulative effect of the activities in this case has a commercial impact. As the regulated activity in this case is not commercial, *Wickard's* aggregation analysis is not applicable. *Morrison*, 529 U.S. at 611 n.4, 120 S. Ct. 1740 ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of an apparent commercial character."); *McCoy*, 323 F.3d at 1120 ("In *Lopez*, the court approved of *Wickard* 's rationale only in relation to activity the economic nature of which was obvious." (citing *Lopez*, 514 U.S. at 558, 115 S. Ct. 1624)); *United*

States v. *Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002) ("No such aggregation of local effects is constitutionally permissible in reviewing congressional regulation of intrastate, *non-economic* activity.").[4]

The majority in *McCoy* went on to examine whether the possession of child pornography at issue in that case could fit within the *Wickard* analysis, largely because a pre-*Morrison* Third Circuit decision had done just that. *See* 323 F.3d at 1121-22. The parties pick up on this discussion and debate whether, unlike the child pornography in *McCoy*, the marijuana at issue here is "fungible" such that the aggregation principle should apply. This debate is unnecessary in light of Supreme Court precedent suggesting that the aggregation principle should only be applied where the activity's commercial character is apparent. *See Morrison*, 529 U.S. at 611 n.4, 120 S. Ct. 1740. Here it is not. Moreover, *McCoy* settled the fungibility issue less by looking at

[4] The dissent relies on *Proyect* v. *United States*, 101 F.3d 11 (2d Cir. 1996), to support the proposition that the activities at issue in this case are "essentially indistinguishable from the activity in *Wickard* . . . ." In this vein, the dissent argues that the appellants' marijuana "*could* be sold in the marketplace, and . . . is also being used for medicinal purposes in place of other drugs which would have to be purchased in the marketplace." *Proyect* is distinguishable from the instant case. Although the individual in *Proyect* argued that his activities could not be regulated under the Commerce Clause because his marijuana was allegedly for personal consumption, the case involved over 100 marijuana plants and the court found that it was "very unlikely that he personally intended to consume all of his crop. . . ." 101 F.3d at 13. Moreover, while *Proyect* argued that the marijuana was only for his personal consumption, he did not allege that it was for medicinal purposes. Therefore the class of activities involved in this case is significantly different from the class of activities involved in *Proyect*.

whether the item was one that could be freely exchanged or replaced (what one might consider to be the important characteristics of fungibility) and more by simply concluding that the photograph at issue in that case was "meant entirely for personal use, without . . . any intention of exchanging it for other items of child pornography, or using it for any other economic or commercial reasons. Nor is there any reason to believe that [Rhonda McCoy] had any interest in acquiring pornographic depictions of other children." 323 F.3d at 1122. Under these standards, the marijuana at issue in this case is similarly non-fungible, as its use is personal and the appellants do not seek to exchange it or to acquire marijuana from others in a market.

Therefore, we conclude that the first *Morrison* factor favors a finding that the CSA, as applied to the facts of this case, is unconstitutional under the Commerce Clause.[5]

[5] In a recent decision, a district court reached the opposite conclusion as to this factor. The court defined the class of activities as "intrastate cultivation and possession of marijuana for medicinal purposes. . . ." *County of Santa Cruz* v. *Ashcroft*, 279 F. Supp. 2d 1192, 1208 (N.D. Cal. 2003). The court concluded that "the declarations and findings of Congress in adopting the CSA make clear that Congress considers such activity to have a substantial effect on interstate commerce because controlled substances are fungible items that influence and contribute to a national black market for controlled substances regardless of the purposes for which they are used." *Id.* at 1209. This analysis is flawed because the congressional findings relied upon do not address the specific class of activities set forth by the court in *County of Santa Cruz*. *See id.* (citing 21 U.S.C. § 801(3)-(6)). Instead, they are concerned primarily with the trafficking and distribution of controlled substances. More importantly, the district court's analysis fails to ask the question set forth in the first *Morrison* factor: whether the statute, as applied to the particular class of activities, regulates

b. *Whether the Statute Contains Any Express Jurisdictional Element That Might Limit Its Reach*

The second factor examines whether the statute contains a "jurisdictional hook" (i.e., limitation) that would limit the reach of the statute to a discrete set of cases that substantially affect interstate commerce. *See McCoy*, 323 F.3d at 1124. No such jurisdictional hook exists in relevant portions of the CSA. *See County of Santa Cruz*, 279 F. Supp. 2d at 1209. Therefore, this factor favors a finding that Congress has exceeded its powers under the Commerce Clause.

c. *Whether the Statute or Its Legislative History Contains Express Congressional Findings Regarding the Effects of the Regulated Activity Upon Interstate Commerce*

Congress clearly made certain findings in the CSA regarding the effects of intrastate activity on interstate commerce. These findings do not specifically address the class of activities at issue here. Relevant findings include:

> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
>
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, is it not feasible to distinguish, in

commerce or an economic enterprise. The congressional findings do not address this question; at best, they address whether the activity—commercial or not—has some effect on interstate commerce. Finally, the district court in *County of Santa Cruz*, by looking solely to congressional findings, erroneously conflated the first and third factors.

> terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
>
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

21 U.S.C. § 801. As noted above, *supra* note 4, these findings are primarily concerned with the trafficking or distribution of controlled substances. Nevertheless, they provide some evidence that intrastate possession of controlled substances may impact interstate commerce.

Therefore, the third factor weighs in favor of finding the CSA constitutional under the Commerce Clause. But it is worth reiterating two things in this respect. First, there is no indication that Congress was considering anything like the class of activities at issue here when it made its findings. The findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician. Common sense indicates that the findings related to this specific class of activities would be significantly different from the findings relating to the effect of drug trafficking, generally, on interstate commerce.[6]

[6] We note that the majority in *McCoy* distinguished the CSA from the statute under consideration in that case on the basis of the fact that the CSA contains express legislative findings regarding the relationship between purely intrastate activities and interstate commerce. *McCoy*, 323 F.3d at 1128 n.24. Citing to drug trafficking cases, the majority in *McCoy* wrote: "It is pri-

Second, *Morrison* counsels courts to take congressional findings with a grain of salt.

> [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, [s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, [w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.

Morrison, 529 U.S. at 614, 120 S. Ct. 1740 (citations and quotation marks omitted). As noted above, it is not the existence of congressional findings, but rather the first and fourth factors—whether the statute regulates commerce or any sort of economic enterprise and whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated"—that are considered the most significant in this analysis.[7] *McCoy*, 323 F.3d at 1119.

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marily on the basis of these congressional findings that we rejected Commerce Clause challenges to the [CSA]." *Id.* These statements from *McCoy* are inapposite to this case for two reasons. First, as discussed above, the drug trafficking cases—for which the congressional findings may provide adequate jurisdictional support—are different in kind from the instant case. Second, the *McCoy* majority noted that *Morrison* may affect the analysis even in those cases. *Id.* ("We express no view, however, as to the effect of *Morrison* on these cases.").

[7] The CSA's congressional findings suggest that it is impractical to distinguish between controlled substances manufactured and distributed intrastate and those manufactured and distributed

d. *Whether the Link Between the Regulated Activity and a Substantial Effect on Interstate Commerce Is "Attenuated"*

The final *Morrison* factor examines whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated." The connections in this case are, indeed, attenuated. Presumably, the intrastate cultivation, possession and use of medical marijuana on the recommendation of a physician could,

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interstate. 21 U.S.C. § 801(5) ("Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, is it not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate."). Putting aside the question of whether feasibility can provide a basis for expanding congressional powers beyond those enumerated in the Constitution, *McCoy* provides a helpful resolution of this issue as it pertains to the class of activities at issue in this case:

> Furthermore, McCoy's factual circumstances, in which she possessed a family photo for her own personal use, with no intention to distribute it in interstate or foreign commerce, do not pose a law enforcement problem of interstate commercial child pornography trafficking. While it is true that child pornography "does not customarily bear a label identifying the state in which it was produced," such problems of identification are not present in this case. As we have emphasized, McCoy's "home-grown" photograph *never entered in and was never intended for interstate or foreign commerce.*

323 F.3d at 1132 (citation omitted) (quoting *United States* v. *Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000)). Applying this logic to the instant case, the feasibility of differentiating between the intrastate class of activities at issue here and more generic interstate drug trafficking is of no moment, as the marijuana in the instant case never entered into and was never intended for interstate or foreign commerce.

at the margins, have an effect on interstate commerce by reducing the demand for marijuana that is trafficked interstate. It is far from clear that such an effect would be substantial. The congressional findings provide no guidance in this respect, as they do not address the activities at issue in the present case. Although not binding, other judges that have looked at the specific question presented here have found that the connection is attenuated. As one of our colleagues wrote recently: "Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to regulate it considerably blur the distinction between what is national and what is local." *Conant* v. *Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (citation omitted). The district court in *County of Santa Cruz* also seriously questioned the strength of the link between such activities and interstate commerce. *See County of Santa Cruz*, 279 F. Supp. 2d at 1209 ("The fourth factor—whether the link between [medical marijuana use] and a substantial affect on interstate commerce is attenuated—arguably favors Plaintiffs.").[8] Therefore, we conclude that this factor

[8] At oral argument, we questioned counsel for the appellants about the origin of the marijuana seeds used by the appellants. Counsel for the appellants assured us that they came from within California. Regardless, we find that the origin of the seeds is too attenuated an issue to form the basis of congressional authority under the Commerce Clause. In *McCoy* we discussed the fact that the film and camera in that case were manufactured out of state. We expressed "substantial doubt" that this fact (which was part of the statute's jurisdictional hook in that case) "adds any substance to the Commerce Clause analysis." *McCoy*, 323 F.3d at 1125. Here, the potential out-of-state production of seeds used by the appellants for their noncommercial activity is a significantly attenuated connection between the appellants' activities and interstate commerce. If the appellees sought to premise Commerce Clause authority in this case solely on the possibility that the seeds used by the appellants traveled through interstate commerce, we would conclude, as we did in *McCoy* with respect to the out-of-state manufacture of the film and camera, that this, by itself, "provides no support for the government's assertion of federal jurisdiction." *Id.* at 1126; *see also United States* v. *Stewart*, 348 F.3d 1132, 1135 (9th Cir. 2003).

favors a finding that the CSA cannot constitutionally be applied to the class of activities at issue in this case.

On the basis of our consideration of the four factors, we find that the CSA, as applied to the appellants, is likely unconstitutional. *See McCoy*, 323 F.3d at 1124 ("It is particularly important that in the field of criminal law enforcement, where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected. . . . The police power is, essentially, reserved to the states, *Morrison*, 529 U.S. at 618, 120 S. Ct. 1740. . . . That principle must guide our review of Congress's exercise of Commerce Clause power in the criminal law area."); *see also Morrison*, 529 U.S. at 610, 120 S. Ct. 1740 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.").

Therefore, we find that the appellants have made a strong showing of the likelihood of success on the merits of their case.

B. *Hardship and Public Interest Factors*

The appellants contend that considerations of hardship and the public interest factors in this case require

entry of the requested preliminary injunction.[9] The district court found that,

> [w]hile there is a public interest in the presumption of constitutional validity of congressional legislation, and while regulation of medicine by the FDA is also important, the Court finds that these interests wane in comparison with the public interests enumerated by plaintiffs and by the harm that they would suffer if denied medical marijuana.

The district court nevertheless denied the injunction given its findings regarding the merits of the case: "[D]espite the gravity of the plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them, the Court is constrained from granting their request." We find that the hardship and public interest factors tip sharply in the appellants' favor.

There can be no doubt on the record as to the significant hardship that will be imposed on the patient-appellants if they are denied a preliminary injunction. The appellees do not dispute this. Instead, the appellees argue that *Oakland Cannabis Buyers' Cooperative* precludes a finding that the public interest favors the appellants. The appellees quote: "[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497, 121 S. Ct. 1711 (quotation marks omitted). However, the relevant portion of that case dealt with what factors a district court may consider when fashioning injunctive relief. *See id.* at

[9] The district court analyzed "the issue of irreparable harm, the balance of hardships, [and] the impact of an injunction upon the public interest" all under the heading "Public Interest Factors."

495-98, 121 S. Ct. 1711. It did not address the constitutional challenges at issue here that call the very foundation of the CSA into question as applied to the class of activities at issue in this case. Therefore, the Court's admonitions[10] are not relevant to this case. It would be absurd for the Court to have meant that, no matter how strong the showing of unconstitutionality, the statute must be enforced.

The appellees also contend that granting the appellants' requested injunction would create a slippery slope as other plaintiffs seeking use of other schedule I controlled substances would bypass the statutory process established by Congress. The appellees claim that the appellants' proposed injunction therefore has the potential to significantly undermine the FDA drug approval process. Our holding is sufficiently narrow to avoid such concerns. Moreover, there is nothing contrary to the public interest in allowing individuals to seek relief from a statute that is likely unconstitutional as applied to them. The public interest of the state of California and its voters in the viability of the Compassionate Use Act also weighs against the appellees' concerns. *Cf. New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its

[10] These admonitions include: "A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." 532 U.S. at 497, 121 S. Ct. 1711; and "Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all." *Id.* at 497-98, 121 S. Ct. 1711.

citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Finally, the appellees' speculative slippery slope concern is weak in comparison to the real medical emergency facing the patient-appellants in this case.

CONCLUSION

For the reasons discussed above, we reverse the district court. We find that the appellants have demonstrated a strong likelihood of success on the merits. This conclusion, coupled with public interest considerations and the burden faced by the appellants if, contrary to California law, they are denied access to medicinal marijuana, warrants the entry of a preliminary injunction. We remand to the district court for entry of a preliminary injunction consistent with this opinion.

REVERSED AND REMANDED.

BEAM, Circuit Judge, dissenting.

It is simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard* v. *Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942). Accordingly, I dissent.

I.

At the outset, I note a justiciability problem that has not been addressed by the parties, the district court or the opinion of the panel majority. Although plaintiffs assert an "as applied" challenge to the workings of the Controlled Substances Act (CSA), the pleadings and evidentiary showings do not disclose, except with one possible exception, that the CSA has actually been

applied to any of plaintiffs' activities. This, of course, raises the question of whether this case is ripe for review and, in turn, whether plaintiffs have standing to bring this case before the court.

"[W]here it is impossible to know whether a party will ever be found to have violated a statute, or how, if such a violation is found, those charged with enforcing the statute will respond, any challenge to that statute is premature." *Alaska Airlines, Inc.* v. *City of Long Beach*, 951 F.2d 977, 986 (9th Cir. 1991). To satisfy Article III's standing requirements, a plaintiff must show that she has suffered a concrete and particularized injury in fact that is actual or imminent (not conjectural or hypothetical). Plaintiff must also show that the injury is fairly traceable to the challenged action of the defendant and that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Citizens for Better Forestry* v. *United States Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003).

In determining whether these jurisdictional prerequisites are satisfied, a court must determine whether the plaintiff has a "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). In asking for injunctive relief, plaintiffs bear a special burden of showing real or immediate threat of irreparable injury when the conduct they are seeking to enjoin has not yet occurred-it is not enough to show past injury. *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). And, the mere existence of a statute which plaintiffs feel they will be

forced to violate is not sufficient to create an Article III case or controversy. *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc).

In *San Diego County Gun Rights*, the court considered a pre-enforcement challenge to the constitutionality of the Violent Crime Control and Law Enforcement Act. The district court had dismissed the claims for lack of standing and ripeness because none of the individual plaintiffs had been prosecuted, arrested or incarcerated for violation of the Act. The plaintiffs challenged the Act on Commerce Clause grounds,[1] and argued they had standing based on, among other things, threat of future prosecution. The court noted that in order to show an imminent and genuine threat of future prosecution, the plaintiffs must have articulated concrete plans to violate the statute. 98 F.3d at 1127. Plaintiffs can meet this prong by showing that they have in the past violated the act and intend to continue engaging in prohibited acts in the future. *Id.* (citing *Babbitt*, 442 U.S. at 303, 99 S. Ct. 2301.) Next, there must be a specific threat of prosecution, and the plaintiffs bear the burden of showing that the act in question is actually being enforced. *Id.* A specific warning of prosecution may suffice, but "a general threat of prosecution is not enough to confer standing." *Id.* Finally, the plaintiffs can meet their burden to show standing in a threat-of-prosecution situation by showing past prosecutions under the act in question. *Id.* at 1128. Because the gun rights plaintiffs could not establish the

[1] Plaintiffs also asserted claims pursuant to the Second and Ninth Amendments. The court dismissed these claims because redress of individual grievances was not cognizable under either amendment. 98 F.3d at 1125.

foregoing requirements, they did not meet their burden of showing they had Article III standing for their claim. *Id.* at 1129.

With regard to ripeness, the court noted that the issue must be "fit for judicial decision" and that "the parties will suffer hardship if we decline to consider the issues." *Id.* at 1132. Because the issues were not "purely legal" and because the plaintiffs had not been threatened with prosecution, the court found that the claims were not ripe for adjudication. *Id.*; *see also Thomas*, 220 F.3d at 1138-39 (holding that landlords who vowed not to follow an anti-discrimination housing statute did not have a justiciable claim for injunctive relief when they had not yet violated the statute and had certainly not been prosecuted for any violation).

In this case plaintiffs allege three instances of injury in their prayer for relief. They ask the court to enjoin the DEA from: 1) arresting or prosecuting them or their caregivers for possession and/or cultivation of marijuana; 2) seizing their medical cannabis; 3) seeking civil or administrative sanctions against them or their caregivers and to declare the CSA unconstitutional as applied to them through these acts. (Plaintiffs' Petition at 12-13). According to the petition, some of Monson's marijuana plants have already been seized, and past history suggests that if the DEA can find out where Raich's plants are, they will be seized as well. Thus, I concede that it is at least arguable that claim two, the "seizing" claim, may be actionable. However, applying *San Diego County Gun Rights* to the injuries alleged in claims one and three, it is clear that they are not ripe for review.

With regard to these two claims, the intent to violate the statute requirement is likely met. Plaintiffs have

violated the CSA in the past, and indicate that they will continue to do so in the future. However, plaintiffs do not show there is a threat of future prosecution or a history of past prosecutions, at least as applied to their unique factual situations. I doubt whether anyone can or will seriously argue that the DEA intends to prosecute these two seriously ill individuals. *E.g.*, Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. Pa. L. Rev. 1787, 1799 n.85 (2003) (noting that "DEA's limited resources make it practically impossible for its officers to enforce minor possession laws without extensive cooperation from state police").

While we can speculate on whether future prosecution is likely (given the fact that they are known users and possessors and they have not yet been arrested or prosecuted), it is the plaintiffs' burden to show standing, not this court's burden to disprove it. *Carroll* v. *Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) ("The party invoking federal jurisdiction, not the district court, bears the burden of establishing Article III standing."). Because this particular issue was not briefed or argued by the parties, or mentioned by the district court, we should remand the case to the lower court to determine whether the threat of criminal prosecution and the possible levying of civil administrative penalties are matters which are ripe for review. I suggest that such a hearing will undoubtedly reveal that plaintiffs simply use this action to seek an advance judicial ruling on government actions that may never

be applied to them or to similarly situated individuals, if any such persons presently exist in California.[2]

II.

Because the plaintiffs arguably may have standing to assert one ripe claim of future injury, the seizure claim, I address the merits of their Commerce Clause arguments. In *Wickard*, an Ohio wheat farmer (Filburn) was fined for growing excess acres of wheat on his small farm. Filburn was charged with violation of the Agricultural Adjustment Act of 1938, which was enacted to control the volume of wheat moving in foreign and interstate commerce, an effort by Congress to address, in part, surpluses, shortages and resulting extreme price variations. Filburn asserted that the Act was an unconstitutional exercise of Congress's Commerce Clause powers because it purported to regulate farm-cultivated wheat milled into flour for on-the-farm family consumption and also used for producing poultry and livestock products which were partly consumed by the Filburn family.[3] The Court rejected this argument,

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[2] I respectfully disagree with the conclusion the court reaches in footnote one of its opinion with regard to remedies available to plaintiffs, even assuming that the court's constitutional conclusions are correct. A court has no power to provide a remedy for a claim over which it has no jurisdiction. And clearly, *California Pro-Life Council, Inc.* v. *Getman*, 328 F.3d 1088 (9th Cir. 2003), provides no support for the proposition the court announces in this regard. *Id.* at 1094 n.2 (noting that the distinction between "standing" and "ripeness" label was largely immaterial). At best, under the posture of this case, the district court may enjoin seizure of plants, nothing more.

[3] It was Filburn's practice to use part of the grain from his "small acreage" of winter wheat to feed poultry and livestock on the farm, some of which products were consumed as food on the farm and also to use some of the wheat to make "flour for home

stating, "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125, 63 S. Ct. 82. The Court then found these activities constituted a substantial economic effect. *Id.* at 128-29, 63 S. Ct. 82.

Notably, the Court stated, "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28, 63 S. Ct. 82. Rationales in support of congressional regulation of how much wheat could be grown on an individual farm included: that wheat growing for whatever purpose was an important commercial enterprise in and among the various states; that wheat surplus and price fluctuations had been a significant economic problem; that several other wheat growing countries had instilled similar growing quotas and price guarantees; and that the direct and indirect consumption of wheat on the farm where it was grown was the "most variable factor in the disappearance of the wheat crop." *Id.* at 125-27, 63 S. Ct. 82.

Except for why the marijuana at issue in this case is consumed, i.e., for medicinal rather than nutritional purposes, plaintiffs' conduct is entirely indistinguishable from that of Mr. Filburn's. The Agriculture Adjustment Act reached Filburn's wheat growing activi-

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consumption." The Supreme Court deemed all of Filburn's uses to be regulable by Congress. *Wickard*, 317 U.S. at 114, 128-29, 63 S. Ct. 82.

ties, even that part of the crop grown, directly and indirectly, for family food consumed in the home on the Filburn farm. Here, under the precedent established in *Wickard*, the CSA clearly reaches plaintiffs' activities, even though they grow, or take delivery of marijuana grown by surrogates, for personal consumption as medicine in the home as permitted by California, but not federal, law.

In reaching its decision, the court defines the regulated class as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician." *Ante* at 1228. The *Wickard* Court could easily have defined the class of activities as "the intrastate, noncommercial cultivation of wheat for personal food purposes." Plaintiffs argue that *Wickard* is distinguishable because Filburn was engaged in the commercial activity of farming, while their activities are purely non-economic.[4]

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[4] This "non-economic" argument apparently attempts to distinguish the usage in *Wickard* from the usage allegations in this case. In *Wickard*, the 239 bushels of wheat produced from the disputed acres were deemed to have been slated for use as follows: a portion made into flour for home use, a portion sold locally as grain, a portion fed on the farm to produce poultry and livestock products with part of these products being consumed as food on the farm, and the balance kept for seed. *Wickard*, 317 U.S. at 114, 63 S. Ct. 82. However, the Supreme Court specifically focused on the regulability of the home-consumption portion of the wheat saying, "[t]he effect of [home] consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop." *Id.* at 127, 63 S. Ct. 82. Therefore, even though plaintiffs' usage of their marijuana crop is all personal, given *Wickard*, the plaintiffs, in their attempt to support this non-economic argument, seek to advance an immaterial factual distinction that leads to no legal difference between the two situations.

This argument fails on two fronts. The cultivation of marijuana for medicinal purposes is commercial in nature. The argument ignores the fungible, economic nature of the substance at issue-marijuana plants-for which there is a well-established and variable interstate market, albeit an illegal one under federal law. And, the growing of wheat for family consumption as flour, which was and is a legal enterprise in Ohio and other states, is as non-economic as it is possible to get with cultivated crops.

The Court in *United States* v. *Lopez*, 514 U.S. 549, 560-61, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) and *United States* v. *Morrison*, 529 U.S. 598, 610, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), expressly affirmed the continuing validity of *Wickard*. And, when put to the tests developed by *Lopez* and clarified in *Morrison*, the CSA clearly passes constitutional muster especially as applied to the plaintiffs. At the risk of some redundancy, I review each *Morrison* refinement under the allegations plaintiffs make in this case.

A. Is this particular activity economic or non-economic, but necessarily regulated as part of a larger regulatory scheme?

Even assuming that the court has correctly defined the class-"the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician"-the conduct at issue is subject to regulation. First, as earlier stated, I respectfully disagree with the court's insertion of the term "noncommercial" into the class definition because the activity at issue here is economic. Plaintiffs are growing and/or using a fungible crop which *could* be sold in the marketplace, and which is also being used for

medicinal purposes in place of other drugs which would have to be purchased in the marketplace. As also earlier indicated, this activity is essentially indistinguishable from the activity in *Wickard*, and our sister circuits have recognized the similarities. *See Proyect* v. *United States*, 101 F.3d 11, 14 (2d Cir. 1996) (per curiam) (rejecting Commerce Clause challenge to a conviction under 21 U.S.C. § 841(a)(1) for growing marijuana even though there was no evidence that the drug was intended for interstate distribution). In *Proyect*, the court noted that cultivation of marijuana for individual use *did* affect commerce in the same way that Filburn's personal consumption of wheat did:

> In any event, the cultivation of marijuana for personal consumption most likely *does* substantially affect interstate commerce. This is so because "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." *Wickard* v. *Filburn*, 317 U.S. 111, 128, 63 S. Ct. 82, 91, 87 L. Ed. 122 (1942). As such, there is "no doubt that Congress may properly have considered that [marijuana] consumed on the [property] where grown if wholly outside the scheme of regulation would have a substantial effect" on interstate commerce. *Id.* at 128-29, 63 S. Ct. at 90-91.

Proyect, 101 F.3d at 14 n.1.[5]

[5] At footnote four of its opinion, the court attempts to distinguish the reach of *Proyect* by noting the involvement of 100 marijuana plants. We know that six cannabis plants were seized from Monson in just one instance and that Raich regularly receives an undisclosed amount of marijuana from her purported benefactors. Over time it is likely that many times over 100 plants will be consumed by these two users alone. Thus, the distinction the

Similarly, cultivating marijuana for personal[6] use keeps plaintiffs from seeking an outside source of either marijuana, or possibly, a (federally) legally prescribed and dispensed drug such as Marinol-both of which are articles of interstate commerce. As with the wheat consumed as food by the Filburns, plaintiffs are supplying their own needs, here symptom-relieving drugs, without having to resort to the outside marketplace. This deportment obviously has an effect upon interstate commerce.

However, even if the word "non-economic" is rightly included within the court's class definition, plaintiffs' behavior is still reached if its regulation is essential to reaching the larger commercial activity. In *United States* v. *Leshuk*, 65 F.3d 1105 (4th Cir. 1995), the court held that the *Lopez* opinion did not alter its previous holding that the possession prohibitions in the CSA were a constitutional exercise of Congress's powers pursuant to the Commerce Clause. *Id.* at 1112. Further, the court noted that the act was not

> unconstitutional *as applied* if his possession and cultivation were for personal use and did not substantially affect interstate commerce. Although a conviction under the Drug Act does not require the government to show that the specific conduct at issue substantially affected interstate commerce . . . *Lopez* expressly reaffirmed the principle that

court attempts to reach is counter-productive to its arguments and actually supports the thrust of this dissent.

[6] To use a well-known basketball term, this case would be a "slam dunk" against Ms. Raich if she were paying her remote suppliers to grow the marijuana she uses. As it is, the consideration the caregivers receive is knowing that Ms. Raich is purportedly in less pain because of their efforts.

> "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."

Id. (quoting *Lopez*, 514 U.S. at 558, 115 S. Ct. 1624 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968))) (emphasis added). *See also Proyect*, 101 F.3d at 14 (quoting the same passage from *Lopez*); *United States* v. *Wall*, 92 F.3d 1444, 1461 (6th Cir. 1996) (Boggs, J., concurring and dissenting) (noting that noncommercial activity is subject to congressional oversight when "its regulation is an essential part of the regulation of some commercial activity").

Prior to *Lopez* and *Morrison*, this circuit held that the CSA does not violate the Commerce Clause. In *United States* v. *Visman*, 919 F.2d 1390 (9th Cir. 1990), the court found that marijuana plants "rooted in the soil" (and therefore which could not have crossed state lines) *do* affect interstate commerce. *Id.* at 1392-93. The court deferred to Congress's findings that "controlled substances have a detrimental effect on the health and general welfare of the American people and that intrastate drug activity affects interstate commerce." *Id.* at 1393. Notably, the court held that "*local* criminal cultivation of marijuana is within a class of activities that adversely affects interstate commerce." *Id.* (emphasis added).

Then, in *United States* v. *Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996), this circuit affirmed the continuing validity of *Visman* in light of the *Lopez* decision. *See also United States* v. *Tisor*, 96 F.3d 370, 374 (9th Cir. 1996) (rejecting Commerce Clause challenge to the CSA after *Lopez*). Furthermore, in *United States* v.

Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996), the court affirmed, with little comment, the district court's rejection of the defendant's Commerce Clause challenge in his conviction for simple possession of marijuana. The *Bramble* district court noted congressional findings that local distribution and possession of illegal drugs contribute to ever increasing interstate drug trafficking. So, even though Bramble was guilty of only simple possession, it was clearly recognized that "there is an interstate market for illegal drugs." 894 F. Supp. 1384, 1395 (D. Haw. 1995).

Of course, none of these cases involve the precise, unique facts involved in this litigation, where plaintiffs are medicinal users of marijuana, grow their own supply or obtain it free of charge from surrogate producers, and do so lawfully under state law. However, because the just-described conduct is still illegal under federal law, there is no meaningful distinction[7] between the simple possessor in *Bramble* and plaintiffs. If Congress cannot reach individual narcotic growers, possessors, and users, its overall statutory scheme will be totally undermined. The goal of the CSA is to prevent the interstate marijuana trade, even medicinal marijuana. Because plaintiffs' actions violate a federal statute, inclusion in the class formulation "for personal medical purposes on the advice of a physician" adds nothing to the analysis. While this result may seem unduly harsh since the plaintiffs are seriously ill, in the eyes of the DEA agent, there is no legal distinction between the

[7] Admittedly, one distinction is that the possessor and user in *Bramble* purchased the marijuana, presumably from a dealer. But, as admitted at oral argument, plaintiffs and their surrogates obviously purchased the *seeds* from an outside source.

simple user and possessor in *Bramble* and *Leshuk* and the plaintiffs.

That medicinal marijuana is acceptable in several states surrounding California also undermines the court's conclusion. Even if the plants are grown for purely medicinal purposes, it is probable that an interstate market for medicinal marijuana has developed with users from surrounding jurisdictions. All of this contributes to "swelling the interstate traffic in such substances." 21 U.S.C. § 801(4) (Congressional findings in support of the CSA). Thus, the activity in question here is almost certainly economic, but even if it is not, as held in *Lopez*, its regulation is essential for Congress's regulation of the larger economic activity of the drug trade.

B. Does the CSA contain a jurisdictional element?

A jurisdictional element is a specific provision in a federal statute which would require the government to establish facts "justifying the exercise of federal jurisdiction in connection with any individual application of the statute." *United States* v. *Rodia*, 194 F.3d 465, 471 (3d Cir. 1999). There is nothing in the statute at issue here which makes a connection to interstate commerce an element of the offense.

C. Were there adequate congressional findings?

As noted in *Visman*, *Kim* and *Bramble*, the congressional findings in the CSA have already been relied upon by this circuit. *See also United States* v. *Rodriquez-Camacho*, 468 F.2d 1220, 1221-22 (9th Cir. 1972). Admittedly, the findings do not address the specific use at issue here-cultivation and personal use for medicinal purposes. However, because medicinal use is not permitted by federal law, I fail to see how

this is a particularly relevant concern. Congressional findings contained in 21 U.S.C. § 801(4) specifically state that, "Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." As pointed out above, plaintiffs' conduct does, or will, contribute to swelling the interstate traffic in marijuana, including medicinal marijuana.

D. What is the extent of the attenuation between this conduct and interstate commerce?

Finally, the court contends that circuit precedent dictates that we recognize such a degree of attenuation between the plaintiffs' conduct and interstate commerce that the connection is effectively severed. I disagree. I begin by acknowledging the dicta in the concurring opinion in *Conant* v. *Walters*-"Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce." *Conant* v. *Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring), cert. denied, — U.S. —, 124 S. Ct. 387, 157 L. Ed. 2d 276 (2003). On the other hand, Congress contemplated individual growers, possessors and users when it made its findings regarding the CSA. 21 U.S.C. § 801(4). And, in light of the growing interstate community of medicinal marijuana users, the attenuation is not great, even, perhaps, nonexistent. Accordingly, an evaluation of any attenuation factor favors the CSA's constitutionality.

Plaintiffs, and the court, rely extensively on this circuit's decision in *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003), but the case does not bear the weight the court places on it. It is distinguishable in at

least one[8] key respect-marijuana is a cultivated, fungible commodity that has objective and readily transferable value in the marketplace, as compared with the noncommercial aspects of the home photograph taken by Ms. McCoy for her personal use. *See id.* at 1120. While it is clear that plaintiffs do not propose to sell or share their marijuana with others similarly situated (or even not similarly situated), they *could*. This is almost certainly not true of the *McCoy* family photograph.

This circuit's more recent decision in *United States* v. *Stewart*, 348 F.3d 1132, 2003 WL 22671036 (9th Cir. 2003) does not alter my conclusions. In *Stewart*, a case that I respectfully believe was wrongly decided, the court invalidated the defendant's conviction for possession of five home-assembled machine guns. The court found that 18 U.S.C. § 922(o) was an invalid exercise of Congress's commerce power as applied to a defendant who assembled parts into a machine gun by himself at home. The court held that because only the machine gun *parts* moved in interstate commerce, and because the guns were unique in that they could only have been made by the defendant himself (they were not part of a machine gun "kit," akin to a "chair from IKEA"), the activity was, according to a majority of the panel, beyond Congress's commerce power. *Id.* at *3.

Purportedly applying the *Morrison* test, the *Stewart* court found that possessing machine guns was not economic activity. The court noted that "[w]hatever its intended use, without some evidence that it will be sold or transferred-and there is none here-its relationship to

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[8] *McCoy* is also distinguishable because the issues there did not suffer from the standing and ripeness problems identified earlier. The *McCoy* defendant had been charged and convicted under the statute she was challenging "as applied."

interstate commerce is highly attenuated." *Id.* at *4. Furthermore, the overall regulation did not have an economic purpose. *Id.* This gun regulatory scenario is distinguishable[9] from that of the CSA and the plaintiffs' possession of the fungible, readily marketable economic commodity at issue here-the marijuana plants. There is nothing unique about Raich and Monson's marijuana seeds or the plants they produce, and in Raich's situation the marijuana plants were clearly "transferred" to her from her horticulturally inclined surrogates.

The *Stewart* court rejected the district court's reasoning that the activity was reachable because the parts had moved in interstate commerce, noting "[a]t some level, of course, everything we own is composed of something that once traveled in commerce." *Id.* at *2. With respect, I disagree, and a prime example of the frailty of this reasoning is Mr. Filburn's home-consumed wheat. Unless we trace the components of that wheat to an unacceptable level (and argue that the nitrogen and other nutrients taken up through the roots, the oxygen absorbed through the leaves and the water absorbed from the soil, all in furtherance of the wheat's growth process, had moved in interstate commerce), I don't believe that the commodity involved in *Wickard* was composed of any parts that had ever moved in interstate commerce.[10] Yet the grain was still deemed by the Supreme Court to be the proper subject

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[9] *Stewart* is also distinguishable for the same reason as *McCoy*, identified in the immediately preceding footnote.

[10] With further respect, and for similar reasons, I think it might come as a surprise to a mid-Nebraska cattle rancher that the baby calf born on his property and ultimately subject to numerous federal agricultural regulations was composed of parts that had moved in interstate commerce.

of congressional regulation through the commerce power. If Mr. Filburn's wheat production for home use was federally regulable, and *Wickard* v. *Filburn* remains binding precedent in this and every other circuit, as it does, plaintiffs' marijuana plants are subject to congressional regulation under the CSA.

III.

Three out of the four *Morrison* factors favor regulation, and the conduct in this case is indistinguishable from the conduct at issue in *Wickard* v. *Filburn*. Accordingly, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 02-4872 MJJ

ANGEL MCCLARY RAICH; DIANE MONSON; JOHN DOE, NUMBER ONE; JOHN DOE, NUMBER 2, PLAINTIFFS

v.

JOHN ASHCROFT, AS UNITED STATES ATTORNEY GENERAL, ET AL., DEFENDANTS

Mar. 4, 2003
As Modified Mar. 19, 2003

ORDER

JENKINS, District Judge.

INTRODUCTION

Before the Court is plaintiffs Angel McClary Raich, Diane Monson, John Doe Number One, and John Doe Number Two's ("Raich," "Monson," or "Plaintiffs") motion for a preliminary injunction against Attorney General John Ashcroft ("Defendant" or "the government").[1] Plaintiffs seek to prevent the government

[1] The term "plaintiffs" shall refer to Angel McClary and Diane Monson, as their rights are at the core of the present case. The two John Does will be mentioned specifically when the analysis bears on them directly. The term "the government" denotes only the federal government. To avoid confusion, any reference to the state government of California will be made by using "California."

from enforcing against them the provisions of the Controlled Substances Act prohibiting the manufacture, distribution, or possession of marijuana. Through California's Compassionate Use Act of 1996, plaintiffs are permitted to use and cultivate marijuana for their personal medical purposes upon a doctor's recommendation. This Act excepts "medical marijuana" from the usual statutory prohibition against possession of cultivation of marijuana found elsewhere in California law. Federal law has no corollary exceptions, however, for the Controlled Substances Act ("CSA") does not recognize marijuana as having any legitimate medical purpose, and any possession or cultivation of marijuana remains illegal under this act. Plaintiffs ask the Court to enjoin defendant from applying federal law to their actions through a preliminary injunction.

According to plaintiffs, in resolving the constitutional issues raised by this motion, this Court will delineate the limits of state and federal regulatory authority regarding controlled substances, specifically marijuana, when grown locally and used for medical purposes. The government frames the issue a bit more narrowly, and it argues that the Court is bound by existing Ninth Circuit precedent to repel the constitutional challenges to the CSA mounted by plaintiffs. Because the Court finds that the weight of precedent precludes a finding of likelihood of success on the merits, plaintiffs' motion for a preliminary injunction is DENIED.

FACTUAL BACKGROUND

Plaintiffs Raich and Monson are two California citizens who currently use marijuana as a medical treatment for a variety of serious physical conditions. While Monson cultivates the cannabis she uses, Raich is unable to grow her own. Instead, her caregivers, the two John Doe plaintiffs, cultivate several varieties and provide them to her without charge. (See Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction ("Motion") at 5:17-22; *see also* Declaration of Angel McClary Raich in Support of Preliminary Injunction ("Raich Decl."), ¶ 48-49.) It is undisputed that both plaintiffs suffer from a number of severe medical conditions. Monson lives with serious chronic back pain, coupled with constant muscle spasms that often prove debilitating. (*See* Declaration of Diane Monson in Support of Motion for Preliminary Injunction ("Monson Decl."), ¶¶ 2, 3.) Her doctor states that these symptoms are caused by a degenerative disease of the spine. (Declaration of Dr. John Rose in Support of Motion for Preliminary Injunction ("Rose Decl."), ¶ 3.) Raich suffers from a daunting litany of more than ten serious medical conditions, many of them life-threatening. (*See* Raich Decl., ¶ 1.) Traditional medicine has utterly failed these women; none of the treatments, prescription medications, or other interventions attempted by them and their physicians has proven effective. (*See* Rose Decl., ¶ 5 (doctor for Diane Monson); see also Declaration of Frank Henry Lucido, M.D. in Support of Preliminary Injunction ("Lucido Decl."), ¶ 7 (doctor for Angel McClary Raich).) The only thing that has provided any relief from symptoms and/or improvement in their condition is medication with cannabis. (Rose Decl., ¶ 4; Lucido Decl., ¶ 6.)

With regard to Raich's marijuana, plaintiffs claim that it is cultivated using only water and nutrients originating from within California, and that it is grown exclusively with equipment, supplies, and materials manufactured within the borders of the state. (Motion at 6:10-14.) No similarly detailed statement of local pedigree is made for Monson's cannabis, but as she has grown it herself, her cultivation of marijuana is similarly local in nature. (*See id.* at 5:21.)

Although both plaintiffs fear that federal agents may raid their homes and deprive them of the marijuana they take on a daily basis, only Monson has actually experienced this. (*See* Raich Decl. ¶¶ 56-57; *see also* Monson Decl. ¶ 10.) She reports that deputies from the Butte County Sheriff's Department and agents from the DEA came to her home on August 15, 2002. (Monson Decl., ¶ 10.) While the sheriff's deputies concluded that Monson's use of cannabis was legally permissible under California's Compassionate Use Act, after a three-hour standoff, including an unsuccessful intervention by the local District Attorney with the United States Attorney for the Eastern District of California, the DEA agents seized and destroyed her six (6) marijuana plants. (*Id.*) To avoid a similar occurrence in the future, and to ensure that they will be able to continue to use cannabis as medication, plaintiffs filed suit in this Court on October 9, 2002, seeking declaratory relief and a permanent injunction. The present motion for a preliminary injunction was filed on October 30, 2002, and a hearing on the motion was held on December 17, 2002.

LEGAL STANDARD

There are various standards the Court can apply to determine whether a preliminary injunction should issue. To meet the "traditional" test, the movant must establish: (1) a strong likelihood of success on the merits; (2) that the balance of irreparable harm favors its case; and (3) that the public interest favors granting the injunction. *American Motorcyclist Ass'n* v. *Watt*, 714 F.2d 962, 965 (9th Cir. 1983). To prevail under the "alternate" test, the movant must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and that the balance of hardships tips sharply in its favor. *Id*; *Diamontiney* v. *Borg*, 918 F.2d 793, 795 (9th Cir. 1990). The formulations under the "alternate" test represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Diamontiney*, 918 F.2d at 795. Under either formulation, however, an "irreducible minimum" is that the moving party must show a fair chance of success on the merits. *Stanley* v. *University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994).

ANALYSIS

Plaintiffs' central argument for likelihood of success on the merits focuses on their contention that it would be constitutionally improper to apply the CSA to individuals in their situation. In addition, they also claim that they have a valid medical necessity defense to any enforcement of the CSA against their use of medical marijuana. Plaintiffs' constitutional argument assumes three forms: (1) when applied to purely intrastate, non-commercial use of medical marijuana, the CSA represents an impermissible extension of

Congress' power to regulate interstate commerce; (2) enforcement of the CSA against medical use of marijuana is an infringement of rights reserved to the States through the Tenth Amendment; and (3) federal criminalization of medical marijuana violates fundamental rights of citizens that are protected by the Ninth Amendment.

1) Federal Prohibition of Medical Marijuana Through The Controlled Substances Act As an Impermissible Expansion of Congress' Commerce Clause Power

In the wake of the Supreme Court's decisions in *United States* v. *Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) and *United States* v. *Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), plaintiffs argue that application of the Controlled Substances Act to their cultivation and use of medical marijuana exceeds the legitimate reach of congressional power. As these two decisions somewhat abridged Congress' exercise of its Commerce Clause power, plaintiffs contend that the Commerce Clause does not apply to purely intrastate, non-commercial activities, such as medication through cannabis that is permitted by state law. (Motion at 6:24-7:1.) The CSA prohibits the manufacture, distribution, possession with intent to deliver, and even simple possession of marijuana, and Congress is permitted to enact such a law only under the mantle of its power to regulate interstate commerce. *See* 21 U.S.C. §§ 841(a)(1), 844(a); *see also* Motion at 7:21- 22 (citing *United States v. Kim*, 94 F.3d 1247 (9th Cir.1996)).

As the Supreme Court in *Lopez* and *Morrison* instructs, Congress' Commerce Clause power is not completely unfettered; it "is subject to outer limits."

Lopez, 514 U.S. at 557, 115 S. Ct. 1624. The limit relevant to the present case is that the regulated activity must have a "substantial relation to interstate commerce." *Id.* at 559, 115 S. Ct. 1624. Further, Congress must conclude that the activity has an economic effect, and this conclusion must be supported by sufficient findings, findings that are not the result of the type of "attenuated analysis" found problematic in *Morrison*. (Motion at 9:12-15 (quoting *Morrison*, 529 U.S. at 613, 120 S. Ct. 1740)[2].) Plaintiffs argue that the cultivation of medical marijuana, or at least the cultivation and use by plaintiffs in this case, does not substantially affect interstate commerce. (Motion at 10:26-28.) In addition, they assert that there are no congressional findings that local, wholly intrastate cultivation and use of cannabis for medical necessity have any such effect. (*Id.* at 11:11-12.)

Plaintiffs acknowledge that Congress has made findings related to the issue of controlled substances and their effect on interstate commerce, findings that are embodied in the statute itself. *See* 21 U.S.C. § 801(1-7).[3]

> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a detrimental effect on the health and general welfare of the American people.

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[2] The principle that regulated activities must be economic in nature is indeed found in *Morrison* at 613, 120 S. Ct. 1740, but the specific passage quoted by plaintiffs at 9:12-15 of their Motion is found on page 615 of the opinion.

[3] *See also* the voluminous Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, reprinted in 1970 U.S.C.C.A.N. 4566.

> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because-
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
>
> (C controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
>
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
>
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the

effective control of the interstate incidents of such traffic.

Id. at (2-6). Rather than ignore these findings, in effect, plaintiffs do two things: they challenge the validity of the findings; and they seek to carve out an exception for people who use locally cultivated medical marijuana that has not impacted interstate commerce in any way. (*See* Reply Memorandum in Support of Preliminary Injunction ("Reply") at 2-3.) Thus, plaintiffs argue that since Congress has failed to establish a nexus between the wholly intrastate, non-commercial use of medical marijuana and interstate commerce, the CSA as applied to them fails constitutional scrutiny.

However, defendant counters plaintiffs' arguments and asserts that the Ninth Circuit has repeatedly held that the Controlled Substances Act is a permissible exercise of congressional authority under the Commerce Clause.

> Relying on the Supreme Court's decision in *Lopez*, defendant argues that Congress exceeded its authority under the Commerce Clause when in enacted 21 U.S.C. § 841(a)(1). In particular, defendant contends that possession of a controlled substance is not necessarily a commercial activity that may be regulated under the Commerce Clause, § 841(a)(1) impermissibly regulates intrastate activity, and states have primary authority to define the penalties for possession of a controlled substance. We conclude that defendant's Commerce Clause argument lacks merit.

United States v. *Kim*, 94 F.3d 1247, 1249 (9th Cir. 1996).[4] The Court of Appeals has rejected challenges to the CSA by a defendant whose marijuana plants were found rooted in the soil, a purely intrastate activity. *See United States v. Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990). The defendant in this case was convicted of possession with intent to distribute marijuana, manufacture of marijuana, and maintaining a place for the manufacture of marijuana. Importantly, he was convicted on the basis of plants that law enforcement agents found rooted in the ground, which, by definition, are not moving in interstate commerce.[5] The defendant argued that there is no reasonable basis to assume that these plants affect interstate commerce and that Congress exceeded its authority in regulating intrastate illegal conduct that affects interstate commerce. *See id.* The Ninth Circuit disagreed.

After considering precedent that upheld congressional regulation of intrastate drug activity under the CSA and other precedent that refused to excise individual instances from an entire class of permissibly regulated activity, the court upheld the conviction. *See id.* at 1392-93 (citing *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220, 1221 (9th Cir. 1972) and *Perez* v. *United States*, 402 U.S. 146, 154, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971), respectively). The *Visman* court

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[4] While the quotation mentions only "possession," the crime at issue in *Kim* was not simple possession, but possession with intent to deliver, as evidenced by the reference to 21 U.S.C. § 841(a)(1), and not § 844.

[5] Evidence of growing equipment and an indoor growing facility were also discovered at the defendant's house, but the focus of the opinion was only on the purely intrastate nature of plants rooted in the soil.

stated, "We defer to Congress' findings that controlled substances have a detrimental effect on the health and general welfare of the American people and that intrastate drug activity affects interstate commerce." *Id.* at 1393. Thus, the holding in *Visman*, which concerned purely intrastate drug activity, is equally applicable to plaintiffs' cultivation and use of marijuana, which allegedly is wholly intrastate as well. (*See* Motion at 6:10-14, 5:21.)

The Ninth Circuit has also specifically upheld the validity of the CSA in light of the Supreme Court decision in *Lopez*, distinguishing the CSA from the Gun-Free School Zones Act found unconstitutional in that case through the presence of congressional findings to support the CSA. *United States* v. *Tisor*, 96 F.3d 370, 374 (9th Cir. 1996). The Ninth Circuit has also endorsed the validity and adequacy of Congress' findings supporting the CSA.[6]

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[6] "Appellant urges that Congress may not constitutionally regulate the intrastate distribution of controlled substances. We disagree. Congress may regulate not only interstate commerce but also those wholly intrastate activities which it concludes have an effect upon interstate commerce. Marijuana is listed among the controlled substances in the challenged statute, and Congress has made specific findings as to the effect of intrastate activities in controlled substances on interstate commerce. 'This court will certainly not substitute its own judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect are clearly nonexistent.' Such is not the case as regards controlled substances.

Congress has concluded that . . . controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. [quoting 21 U.S.C. § 801(2)] Appellant urges that this assertion is inapplicable to marijuana. This is a matter, however, whose ultimate resolution lies in the legislature and not in the courts. It is sufficient that Congress have a rational basis for its findings." *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220, 1221 (9th Cir. 1972) (quoting *Stafford* v. *Wallace*, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735 (1922)); accord *Visman* 919 F.2d at 1390.

Plaintiffs assert that *Lopez* is not dispositive of the Commerce Clause issue raised herein because the Supreme Court has implicitly overruled the Ninth Circuit authority relied on by the government through its decision in *Morrison*. In *Morrison*, the Supreme Court rejected a provision of the Violence Against Women Act of 1994 ("VAWA") not because of a lack of congressional findings, as in *Lopez*, but rather, because of the inadequacy of those findings. *Morrison*, 529 U.S. at 614, 120 S. Ct. 1740. As importantly, plaintiffs argue that the Supreme Court's decision did not invalidate the entire VAWA, but just the portion giving victims of gender-based violence a civil remedy against their assailants. See *id.* at 613, n.5, 120 S. Ct. 1740. The Supreme Court only found Congress' findings in support of this particular section to be inadequate. Similarly, plaintiffs ask this Court to determine that the findings made by Congress in support of a particular provision of the CSA are inadequate. They charge that the findings are insufficient to support the exercise of Commerce Clause power over the wholly intrastate, non-economic possession and cultivation of marijuana for personal medical use, use that has been made legal under state law. (See Motion at 10.)

Contrary to plaintiffs' wishes, the Court is constrained from such a determination by the weight of precedent. As discussed above, the Ninth Circuit has repeatedly upheld the constitutionality of the CSA as applied to marijuana. See *Tisor*, 96 F.3d. at 374;

Rodriquez-Camacho, 468 F.2d at 1221. The Court of Appeals has confirmed the validity and adequacy of Congress' findings in support of the CSA, including its application to wholly intrastate cultivation of marijuana. *Visman*, 919 F.2d at 1392. This Court may not overrule a decision of the Ninth Circuit in the absence of an intervening Supreme Court decision that undermines the existing precedent, and both cases are closely on point.

> As a general rule, one three judge panel of this court cannot reconsider or overrule the decision of a prior panel. An exception to this rule arises when "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point."

United States v. *Gay*, 967 F.2d 322, 327 (9th Cir. 1992) (citing *United States* v. *Mandel*, 914 F.2d 1215, 1220-21 (9th Cir. 1990)) (quoting *United States* v. *Lancellotti*, 761 F.2d 1363, 1366-67 (9th Cir. 1985)).[7] [8]

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[7] *United States* v. *Gay* set forth the rule for a three-judge panel of the Ninth Circuit in overruling the decision of another three-judge panel. The need for an applicable higher-court decision is even more pronounced in the case of a district court, such as this one, overruling Ninth Circuit precedent.

[8] The Court notes the similar conclusion reached by Judge Fogel in *Wo/Men's Alliance for Medical Marijuana* v. *United States*, No. 02-MC-7012 JF (N.D. Cal. 2002), a case presented to the Court and discussed at the hearing on the motion. The Court also notes that defendant has filed a number of Notices of Recent Case after the hearing date, attempting to draw the Court's attention to other decisions in this Circuit in which courts have declined to accept constitutional challenges to the CSA's application to medical cannabis. Plaintiffs have registered their objections to the timing of these notices, but the objections are moot, as the Court has not considered these cases.

While plaintiffs no doubt consider *Morrison* to be the type of an intervening Supreme Court decision required by the holding in *Gay*, and notwithstanding plaintiffs' attempt to create a factual record that would render their "as applied" attack successful under *Morrison*, the decision in *Morrison* is insufficiently on point to permit this Court to overrule the *Visman*, *Rodriquez-Camacho*, and *Tisor* line of cases. While the Supreme Court in *Morrison* provided some insight into its analysis of what congressional findings are necessary to meet the "substantially affects" test in the context of a commerce clause challenge, see *id.*, 529 U.S. at 614-18, 120 S. Ct. 1740, the case does not speak to or address the specific findings attendant to the CSA in a way that allows this Court to depart from existing Ninth Circuit precedent on this question. Therefore, this Court is not at liberty to depart from current authority holding that Congress' findings are sufficient to overcome a Commerce Clause challenge, even one involving a purely intrastate possession of a controlled substance.

In the final analysis, neither *Lopez* nor *Morrison* answer definitively the question posed to this Court: whether the Controlled Substances Act, as applied in this case, is beyond the purview of Congress' power to regulate activity under the Commerce Clause. Therefore, the Court is still bound by existing Ninth Circuit authority on this issue.[9]

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[9] Interestingly, the Supreme Court deliberately chose not to address this question in *Oakland Cannabis Club*. *See United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 n.7, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) ("Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce

By arguing that the provisions of the CSA should not be applied to those who cultivate wholly intrastate medical marijuana that has not been circulated in commerce, plaintiffs are asking the Court to ignore valid Ninth Circuit decisions that have endorsed two of Congress' specific findings: (1) controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate; and (2) federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic, 21 U.S.C. § 801(5), (6). In the final analysis, this Court cannot undertake the resolution of this important issue as it is constrained from doing so by existing Circuit precedent—precedent which has found that the CSA passes constitutional muster.

2) The Controlled Substances Act As a Violation of the 10th Amendment

Plaintiffs correctly state that Congress' power to regulate interstate commerce, while plenary within the field, is nonetheless confined within limits. (Motion at 16:4-9). An important restriction on congressional

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Clause."). Thus, the existing Ninth Circuit cases are still binding law. Since the Supreme Court has deliberately chosen not to address the question of whether the CSA represents a constitutionally permissible exercise of Congress' Commerce Clause power, this Court must rely on the precedent provided by the Ninth Circuit.

As plaintiffs point out, Judge Kozinski, in his concurring opinion in *Conant* v. *Walters*, 309 F.3d 629 (9th Cir. 2002), raises interesting and substantial questions, albeit in the context of the First Amendment, regarding the constitutionality of the CSA. However, the concurring opinion in *Conant* is not the law of this Circuit on the important questions currently before this Court.

power is found in the Tenth Amendment, which is designed to proscribe the encroachment of the federal government into areas reserved for the States. Arguing that the Supreme Court has upheld the States' power to enact wholly intrastate measures protecting public health and to regulate professions that closely concern public health, plaintiffs assert that "under the Tenth Amendment, the wholly intrastate activity of possessing and cultivating medical cannabis pursuant to state law, is an exercise of the police power reserved to the State of California, primarily responsible for the health and safety of its citizens, a power central to the sovereignty of the States." (Motion at 17:13-16 (earlier quoting *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38-39, 25 S. Ct. 358, 49 L. Ed. 643 (1905), and *Watson* v. *Maryland*, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987 (1910)).)

Defendant argues that since the passage of the Controlled Substances Act was a valid exercise of Congressional power under the Commerce Clause, plaintiffs' Tenth Amendment argument is overcome. The Supreme Court has held that a valid exercise of Commerce Clause authority that displaces States' exercise of their police powers or curtails the States' ability to legislate on matters they may consider important does not constitute an invasion of sovereign areas reserved to the States by the Tenth Amendment. *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 291, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). The Constitution has given Congress various enumerated powers, including the power to regulate interstate commerce. If that power, surrendered to the federal government, is validly exercised, it does not infringe upon any sovereignty that has been retained by the

States. See *New York* v. *United States*, 505 U.S. 144, 156-57, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'") (quoting *United States* v. *Darby*, 312 U.S. 100, 124, 312 U.S. 657, 61 S. Ct. 451, 85 L. Ed. 609 (1941)).

Examples of where the Supreme Court has curtailed federal power under the Tenth Amendment are found when Congress has compelled some sort of state action. See *New York*, 505 U.S. at 166, 112 S. Ct. 2408 ("We have always understood that where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *Reno* v. *Condon*, 528 U.S. 141, 149, 120 S. Ct. 666, 145 L. Ed. 2d 587 (2000) (preventing the federal government from "commandeering" the state legislative process); *and Printz* v. *United States*, 521 U.S. 898, 925, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("[T]he federal government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). This type of "commandeering" is not at issue in this case, for the federal government is not forcing California, or any other State, to take any action. The CSA regulates individual behavior, and plaintiffs are asking the Court to prevent the government from applying those regulations to their conduct. As the promulgation of the CSA was a legitimate exercise of Congressional power under the Commerce Clause, the Tenth Amendment is not implicated.

3) The Controlled Substances Act As a Violation of the Ninth Amendment

Plaintiffs argue that while the Tenth Amendment limits Congress solely to the powers enumerated by the Constitution, the Ninth Amendment prohibits an overly broad interpretation of those powers, in order to preserve individual liberties. (Motion at 18:3-11.) Plaintiffs assert that these liberties are not only those delineated in the Bill of Rights, but consist of unenumerated liberties as well. (*Id.* at 17-18.) For this reason, recognized rights such as the right to bodily integrity, the right to amelioration of pain, and the right to prolong one's life, while not listed by the Constitution, nonetheless equally enjoy its protection. (See *id.* at 19:4-9.) Plaintiffs argue that in determining what constitutes one of these unenumerated, yet fundamental rights, the courts should defer to the judgment of the people. (See *id.* at 23- 24.) "Moreover, the People of California and the State of California have expressly determined that 'seriously ill Californians have *the right* to obtain and use marijuana for medical purposes. . . .' Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added)." (*Id.* at 24:13-16.) When it infringes such a fundamental right, including the right of patients to use medication of a kind and quantity adequate to address their pain or prolong their lives, the federal government must provide a compelling reason. (*Id.* at 21:6-14) (citing *Washington* v. *Glucksberg*, 521 U.S. 702, 766, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1977).) Plaintiffs argue that application of the CSA deprives them of their fundamental right to use the only medication adequate to sustain them, thereby infringing their rights to bodily integrity, to ameliorate their pain, and to prolong their lives, and that the federal government has failed to

provide a sufficiently compelling justification for this deprivation.

Defendant counters by asserting that the CSA only deprives plaintiffs of the right to use lawfully a *type of treatment*, not the right to treatment itself. (See Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opp.") at 16-17.) Defendant directs the Court to *Carnohan* v. *United States*, 616 F.2d 1120 (9th Cir. 1980), in which the court found that a terminally ill cancer patient could not seek a declaratory judgment that he had the right to obtain and use laetrile, a non-approved drug for the treatment of cancer. The Court held that Constitutional rights of privacy and personal liberty did not afford the plaintiff the right "to obtain laetrile free of the lawful exercise of government police power." *Id.* at 1122. In this case, the Court also cited with approval the Tenth Circuit's decision in *Rutherford* v. *United States*, 616 F.2d 455 (10th Cir. 1980). The latter case also dealt with cancer patients' ability to obtain laetrile for treatment. The Tenth Circuit stated that:

> It is apparent in the context with which we are here concerned that the decision by the patient *whether to have a treatment or not* is a protected right, but his selection of a *particular treatment*, or at least a medication, is within the area of government interest in protecting public health.

Id. at 457 (emphasis added). While plaintiffs may vehemently disagree with the wisdom of the federal government's determination that marijuana has no medical efficacy and therefore, that federal law renders it unavailable for prescription to patients, they do not have a fundamental, constitutional right to obtain and use it for treatment. See 21 U.S.C. § 812, Schedule I(c)(10)

(placing marijuana in Schedule I); *see also* 21 U.S.C. § 812(b)(1)(B) (describing Schedule I drugs as having "no currently accepted medical use in treatment in the United States"); *and Rutherford*, 616 F.2d at 457. Therefore, Congress' outlawing of marijuana, even for medical uses, does not run afoul of the Ninth Amendment.

4) Availability of the Medical Necessity Defense

Plaintiffs' final argument rests of the defense of medical necessity. Medical necessity was raised as a defense to enforcement of federal marijuana laws in the Ninth Circuit's decision in *United States* v. *Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999). While the Ninth Circuit accepted the possibility of a medical necessity defense to criminal prosecution for distribution of marijuana for medical purposes, see *id.* at 1115, the Supreme Court overruled this decision in *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) ("OCBC "). Nonetheless, plaintiffs maintain that the opinion has been preserved for those people who are not distributors of marijuana. (Motion at 25:6-7.) They rely for this proposition on the wording of Justice Stevens' concurring opinion, who states that since the issue before the Court in *OCBC* was a medical necessity defense to distribution, the reversal of the Ninth Circuit's decision dealt only with this possible offense, leaving the use of medical necessity by persons such as plaintiffs—"seriously ill patient[s] for whom there is no alternative means of avoiding starvation or extraordinary suffering"—as an open question. *OCBC*, 532

U.S. at 501, 121 S. Ct. 1711 (Stevens, J., concurring).[10] However, the language of the majority opinion in OCBC, delivered by Justice Thomas, is dispositive on this question.

> Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is "seriously ill" and lacks alternative avenues for relief.

Id. at 494, n.7, 121 S. Ct. 1711 (Thomas, J.) As there is no distinction between manufacturing and distribution, for which there is no medical necessity defense, it follows that there is no medical necessity defense for other prohibitions in the CSA, such as possession of marijuana.

The main foundation for the Supreme Court's position in *OCBC* rests upon Congress' findings that marijuana has no currently accepted medical use. *See id.* at 491, 121 S. Ct. 1711 (citing 21 U.S.C. § 811). The original placement of marijuana in Schedule I, the most restrictive schedule of the CSA, means that it was

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[10] Even if this reading of *OCBC* were correct, this would not shield John Does Number One and Two from possible prosecution. As they are caregivers who distribute marijuana, they would not be able to avail themselves of the necessity defense, unless they were considered to be a single "unit" with Raich for the purpose of criminal liability. While the Compassionate Use Act excludes caregivers as well as patients from California state law criminal liability, it is not clear how broad the protection a medical necessity defense would cast in a federal prosecution.

determined that marijuana has no current medical use for treatment in the United States, has a high potential for abuse, and has a lack of accepted safety for use under medical supervision. *Id.* (citing 21 U.S.C. § 812(b)(1)(A-C)).

> It is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument [that a drug in Schedule I can be medically necessary, notwithstanding that it has "no medical use"].

Id. at 493, 121 S. Ct. 1711. Plaintiffs vigorously contest Congress' finding that medical marijuana has no medical application, and the evidence in their declarations is powerful testimony to support their position. Nonetheless, as the Supreme Court was not in a position to overturn the legislative determination that placed marijuana in Schedule I, and thus, made it unavailable for prescription to seriously ill people, much less so is this Court. The Court must also follow the dictate of the Supreme Court in its finding that there is no medical necessity defense for any of the prohibitions contained in the CSA, including even possession for medicinal use.

5) Public Interest Factors

Since the binding effect of prior decisions indicates that plaintiffs have demonstrated no likelihood of success on the merits, the Court need not address the issue of irreparable harm, the balance of hardships, or the impact of an injunction upon the public interest. *See Stanley* v. *University of Southern California*, 13 F.3d at 1319. However, the importance of this case dictates that these factors merit some brief attention.[11]

This case has a clear impact on the public interest of all Californians, and it obviously is of paramount interest to plaintiffs. The enactment of the Compassionate

[11] The Court notes the divergence of opinion regarding analysis of the public interest in the history of the *Oakland Cannabis Buyer's Cooperative* case. In *OCBC*, 190 F.3d 1109, 1114 (9th Cir. 1999), the Ninth Circuit found that Judge Breyer's failure to "expressly consider the public interest on the record" in *U.S.* v. *OCBC*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998), was an abuse of discretion. However, the Supreme Court reversed the Ninth Circuit in its own *OCBC* decision, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001). In discussing the Ninth Circuit's decision, the Supreme Court held that the district court was not at liberty to consider "any and all factors that might relate to the public interest or the conveniences of the parties, including the medical needs of the Cooperative's patients." *Id.* at 497, 121 S. Ct. 1711. "On the contrary, a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation. A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *Id.* (citations omitted). The Supreme Court held that an analysis of the public interest is appropriate only in considering an injunction versus other means of enforcing a statute, "To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms." *Id.* at 498, 121 S. Ct. 1711.

Use Act of 1996 manifests the express will of California voters to permit individuals with a medical need for marijuana treatment to have access to the drug, subject to a doctor's supervision. Federal enforcement of the Controlled Substances Act, plaintiffs assert, serves to thwart this will. This conflict between state and federal law is far from a purely theoretical quandary, as Monson's incident with the sheriff's deputies and the DEA amply demonstrates. Plaintiffs' list of medical conditions, and their statements that marijuana is the only medication that has proven effective to ameliorate their symptoms, provide strong evidence that plaintiffs will suffer severe harm and hardship if denied use of it.

Countering plaintiffs' argument, the government contends that the public interest and the other equities actually favor denial of the injunction. The only interests to which it points, though, are the presumption of constitutionality of congressional statutes and the potential of an injunction permitting the use of medical marijuana "to significantly undermine the FDA drug approval process." (Opp. at 24.)[12] In the government's view, Congress has opposed efforts to legalize marijuana and other Schedule I drugs without valid, scientific evidence that they are safe and effective and without the approval of the Food and Drug Administration. (*Id.* quoting Pub. L. No. 015-277, Div. F, 112 Stat. 2681, 760-61 (1998).) While there is a public interest in the presumption of constitutional validity of congressional legislation, and while regulation of medicine by the

[12] Defendant also argues that no irreparable injury to plaintiffs is possible if they are denied access to medical cannabis because they lack the right to obtain a drug that is not approved by the government for medical use. (Opp. at 22 (citing *Carnohan*, 616 F.2d at 1122, and *Rutherford*, 616 F.2d at 457).)

FDA is also important, the Court finds that these interests wane in comparison with the public interests enumerated by plaintiffs and by the harm that they would suffer if denied medical marijuana.

However, despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them, the Court is constrained from granting their request. Plaintiffs are unable, on this record, to establish the required "irreducible minimum" of a likelihood of success on the merits under the law of this Circuit, and accordingly, the request for injunctive relief must be denied *See American Motorcyclist Ass'n* v. *Watt*, 714 F.2d at 965; *Stanley* v. *University of Southern California*, 13 F.3d at 1319. Since both the "traditional" and "alternative" tests for preliminary injunction require plaintiffs to demonstrate a likelihood of success on the merits, their failure to meet this requirement dictates that their motion for preliminary injunction must be denied under either standard. The fact that, in this Court's view, the equitable factors tip in plaintiff's favor does not alter the Court's conclusion.

CONCLUSION

All of plaintiffs' arguments in support of their position are unavailing: the weight of precedent precludes this Court from determining that Congress' findings in support of the CSA are insufficient to survive constitutional challenge; the CSA is not a violation of the Tenth Amendment or the Ninth Amendment; and plaintiffs cannot successfully mount a medical necessity defense.

Since plaintiffs are unable to establish any likelihood of success on the merits, their motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15481

ANGELA MCCLARY RAICH; DIANE MONSON,ET AL.,
PLAINTIFFS-APPELLANTS

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM B. SIMPKINS, ACTING ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, DEFENDANTS-APPELLEES

[Filed: Feb. 25, 2004]

ORDER

Before: PREGERSON, BEAM,[1] and PAEZ, Circuit Judges.

Judges Pregerson and Paez have voted to deny appellees petition for rehearing and rehearing en banc. Judge Beam voted to grant the petition for rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

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[1] Honorable C. Arlen Beam, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for rehearing and for rehearing en banc is DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 02-4872 EMC

ANGEL MCCLARY RAICH, DIANE MONSON,
JOHN DOE NUMBER ONE, JOHN DOE NUMBER TWO

v.

JOHN ASHCROFT, AS UNITED STATES ATTORNEY
GENERAL, AND ASA HUTCHINSON, AS ADMINISTRATOR
OF THE DRUG ENFORCEMENT ADMINISTRATION

October 9, 2002

SUMMONS IN A CIVIL CASE

TO: (Name and address of defendant)

John Ashcroft
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

and

Asa Hutchinson
Administrator
Drug Enforcement Administration
U.S. Department of Justice
700 Army Navy Drive
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

Randy E. Barnett
Boston University School of Law
Boston, MA 02215

David M. Michael
294 Page Street
San Francisco, CA 94102
United States Attorney

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

[SEAL OMITTED] OCT-9 2002
DATE

RICHARD W. WILKING
Clerk

SIGNATURE ILLEGIBLE
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 02-4872 EMC

ANGEL MCCLARY RAICH, DIANE MONSON, JOHN DOE NUMBER ONE, AND JOHN DOE NUMBER TWO, PLAINTIFFS

v.

JOHN ASHCROFT, AS UNITED STATES ATTORNEY GENERAL, AND ASA HUTCHINSON, AS ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, DEFENDANTS

[Filed: Oct. 9, 2002]

COMPLAINT FOR DECLARATORY RELIEF AND FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Plaintiffs ANGEL MCCLARY RAICH, DIANE MONSON, JOHN DOE NUMBER ONE, and JOHN DOE NUMBER TWO bring this action for declaratory, injunctive, and other relief, and on information and belief, hereby allege:

INTRODUCTION

1. The Defendants are unconstitutionally exceeding their authority by embarking on a campaign of seizing or forfeiting privately-grown wholly intrastate medical

cannabis from California patients and caregivers, arresting or prosecuting such patients and caregivers, mounting paramilitary raids against such patients and caregivers, harassing such patients and caregivers, and taking other civil or administrative actions against them. The Defendants purport to have authority for those actions under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

2. On November 5, 1996, the sovereign State of California and the People of the State of California, exercising their reserved powers and expressly retaining certain rights, duly enacted through the initiative process the Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5. The purposes of the Compassionate Use Act are "[tlo ensure that seriously ill Californians have the *right* to obtain and use marijuana for medical purposes" and "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes . . . are not subject to criminal prosecution or sanction." Cal. Health & Safety Code § 11362.5(b)(1)(A), (B). (Emphasis added.) All of Plaintiffs' conduct is lawful under the Compassionate Use Act.

3. Defendants' actions are effectively preventing implementation of the Compassionate Use Act, thereby abrogating the powers and rights constitutionally reserved and retained by the sovereign State of California and the People of California under the Ninth and Tenth Amendments to the U.S. Constitution. Moreover, Defendants' actions are infringing on Plaintiffs' rights guaranteed by the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Additionally, to the extent that Defendants purport to take their actions pursuant to an act of Congress, then such act

exceeds the powers of Congress granted under the Commerce Clause of the U.S. Constitution. Furthermore, the doctrine of Medical Necessity precludes Defendants' actions against Plaintiffs.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201.

5. Venue is proper in this Court under 28 U.S.C. §§ 1391 (e) and 1402(a)(1).

PARTIES

Plaintiffs

6. Plaintiff ANGEL McCLARY RAICH ("ANGEL") is a seriously ill patient who would likely be dead today were it not for her use of medical cannabis. ANGEL suffers from numerous severe debilitating medical conditions for which cannabis uniquely provides relief. ANGEL's primary care physician, and all of her numerous specialist physicians, support ANGEL's use of medical cannabis. ANGEL is a Medical Necessity patient-member of the Oakland Cannabis Buyers' Cooperative, from which she used to obtain her medicine. Because ANGEL cannot cultivate her own cannabis, she now relies on two caregivers who provide cannabis to her without charge. ANGEL resides in Oakland, California.

7. Plaintiff DIANE MONSON of Butte County, California is a patient who uses medical cannabis on her doctor's recommendation to treat Severe following a three-hour standoff in MONSON's front yard, federal agents raided her home Chronic Back Pain and Spasms. On August 15, 2002, followed her home and seized her six (6) medical cannabis plants, in defiance of an urgent

telephone plea by Butte County District Attorney Mike Ramsey to U.S. Attorney John K. Vincent imploring him to spare MONSON's medicine.

8. Plaintiff JOHN DOE NUMBER ONE, of Oakland, California, cultivates cannabis on ANGEL's behalf, which he supplies to ANGEL free of charge, without any cost or remuneration whatsoever. In order to protect ANGEL's supply of medical cannabis, JOHN DOE NUMBER ONE sues in an anonymous capacity. In the cultivation of ANGEL's medical cannabis, JOHN DOE NUMBER ONE uses only water and nutrients originating from within the borders of the State of California. Further, JOHN DOE NUMBER ONE uses exclusively growing equipment, supplies, and materials manufactured within the borders of the State of California. JOHN DOE NUMBER ONE cultivates for ANGEL medical-grade cannabis free of mold, fungus, pesticide residue, and other contaminates in the particular strains and potencies that ANGEL has found to be most effective in treating her specific medical conditions.

9. Plaintiff JOHN DOE NUMBER TWO, of Oakland, California, cultivates cannabis on ANGEL's behalf, which he supplies to ANGEL free of charge, without any cost or remuneration whatsoever. In order to protect ANGEL's supply of medical cannabis, JOHN DOE NUMBER TWO sues in an anonymous capacity. In the cultivation of ANGEL's medical cannabis, JOHN DOE NUMBER TWO uses only water and nutrients originating from within the borders of the State of California. Further, JOHN DOE NUMBER TWO uses exclusively growing equipment, supplies, and materials manufactured within the borders of the State of California. JOHN DOE NUMBER TWO cultivates for ANGEL medical-grade cannabis free of mold, fungus, pesticide

residue, and other contaminates in the particular strains and potencies that ANGEL has found to be most effective in treating her specific medical conditions.

Defendants

10. Defendant JOHN ASHCROFT is sued in his official capacity as the Attorney General of the United States of America, which is one of the sovereigns in our federal system of Dual Sovereignty.

11. Defendant ASA HUTCHINSON is sued in his official capacity as the Administrator of the Drug Enforcement Administration (DEA), an agency of the United States of America, which is one of the sovereigns in our federal system of Dual Sovereignty.

MEDICAL BACKGROUND

12. As a mother of two children, Plaintiff ANGEL opposed all illegal drug use, including the recreational use of marijuana, until the benefits of cannabis became unmistakable for the treatment of ANGEL's own medical conditions.

13. ANGEL suffers from the following, often interrelated, medical conditions: a) Life-Threatening Weight Loss, Malnutrition, Cachexia, and Starvation; b) Chronic Nausea; c) numerous Severe Chronic Pain afflictions from: Scoliosis, Temporomandibular Joint Dysfunction Syndrome (TMJ), Endometriosis, Headaches, Rotator Cuff Syndrome, and Uterine Fibroid Tumor; d) Post Traumatic Stress Disorder (P.T.S.D.); e) Non-Epileptic Seizures; f) Fibromyalgia; and g) an inoperable Brain Tumor. Moreover, ANGEL endured four years of Paralysis, which confined her to a Wheelchair; her doctors said she would never walk again, but she then discovered cannabis as the only treatment that brought her Paralysis into complete remission.

14. ANGEL's doctors now recommend that she medicate with cannabis every two hours. She medicates' by ingesting, smoking, and vaporizing cannabis. Her physicians emphatically insist that ANGEL "cannot be without this medicine" because severe Weight Loss and flare-ups of her Chronic Pain conditions would quickly develop. When ANGEL's Pain levels are elevated she is prone to having Seizures.

15. The Appendix hereto, *supra*, is a description of ANGEL's numerous complex medical conditions, and an explanation of how medical cannabis is the only effective treatment for her medical conditions. Plaintiffs reallege and incorporate by reference all paragraphs of the Appendix hereto as if set forth fully in the body herein.

16. Without access to medical cannabis, ANGEL would experience horrible pain, suffering, and death. Horrible pain suffering, and death constitute irreparable harm.

17. ANGEL requires over two and one-half ounces of cannabis per week, or in excess of eight pounds of cannabis per year, for her personal medical consumption. Angel is a member of the Oakland Cannabis Buyers' Cooperative (OCBC), and used to obtain her medicine there, but cannot now obtain her medicine from OCBC because of Defendant UNITED STATES OF AMERICA's actions against the OCBC starting in 1998. ANGEL lives in fear that her home will be raided, her medical cannabis will be seized, she or her caregivers will be arrested, or her property will be forfeited by Defendants' actions, whether or not the Defendants ever file criminal charges against her. Stress from that fear is further exacerbating ANGEL's already precarious medical conditions.

18. If Defendants were to take ANGEL into custody and deny her access to medical cannabis, she would suffer serious medical consequences within a matter of hours. Because of ANGEL's already fragile medical condition, even a raid by Defendants on ANGEL would trigger severe medical repercussions.

19. ANGEL is at particular risk ofbeing targeted by the Defendants: ANGEL has been quoted in electronic and print media locally, nationally, and internationally as a medical cannabis patient, and has defiantly stated that, faced with the alternative of an agonizing death, she would continue to use medical cannabis notwithstanding the federal war on cannabis patients. Contrary to claims by Defendant HUTCHINSON, the Defendants are engaging in a campaign of selective prosecution targeting medical cannabis patients, especially the ones who have been most outspoken publicly.

20. ANGEL is a Medical Necessity Patient. She is one (1) of only fourteen (14) members designated as being a Medical Necessity Patient by the OCBC following rigorous and meticulous evaluations by the OCBC's medical and administrative staff. As discussed more thoroughly herein, ANGEL suffers from numerous serious medical conditions. She would suffer imminent harm if she did not have access to cannabis. She needs cannabis to treat her medical conditions or their symptoms. She has no reasonable alternative to cannabis because she is violently allergic to virtually all pharmaceutical medications.

21. Plaintiff DIANE MONSON has suffered from Severe Chronic Back Pain and Spasms since 1989. She first tried medical cannabis in 1998, and uses it on the recommendation of her doctors in light of its remarkable efficacy at controlling her symptoms. MONSON's

Spasms are an extremely painful experience in their own right, comparable in intensity to an uncontrollable cramp. Medical cannabis completely eliminates her Spasms. Even with medical cannabis, MONSON still experiences discomfort, but cannabis greatly relieves her Chronic Pain. Without cannabis, her spasms would return and she would be subjected to intense pain that cannot be relieved any other way. MONSON has tried various combinations of prescription pharmaceutical medications, but they are often ineffective and they always disrupt her quality of life by interfering with her ability to function. In contrast, MONSON has found cannabis to be both effective and free of undesirable side-effects.

LEGAL BACKGROUND

The Commerce Clause

22. Wholly intrastate activity is beyond the power of Congress "to regulate Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8. *See The Federalist* 42 (J. Madison) (referring to the power "to regulate between State and State"). Protecting wholly intrastate commerce from the reach of Congress is a constitutional imperative in our federal system. To the extent the Controlled Substances Act purports to grant Defendants' authority to conduct the activities complained of herein, such Act exceeds the authority granted to Congress under the Commerce Clause. Plaintiffs seek protection for conduct that has no effect whatsoever on interstate commerce; indeed, Plaintiffs' conduct is not commerce at all.

State Sovereignty as Confirmed in the Tenth Amendment

23. The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. Although the Constitution delegates to Congress the power over interstate commerce and other national concerns, the States are primarily responsible for the health and safety of their citizens, a power known as the "police power." Traditionally, no power is more central to the sovereignty of the States, and Congress lacks such a power. State governments have authority to enact measures reasonably necessary to protect public health. Congress cannot exercise its power over interstate commerce to interfere with a State's police power by prohibiting *wholly intrastate* conduct that the State mandates in the interest of health or safety. Respect for the sovereign States that comprise our Federal Union imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country." The only doctrine preventing federal usurpation of traditionally State regulated activities is that such federal actions would violate the principles of federalism. To the extent the Controlled Substances Act purports to grant authority for Defendants to prohibit the conduct for which Plaintiffs herein seek protection, the Act exceeds Congress's constitutional authority by abrogating powers reserved to the State of California.

Fundamental Constitutional Rights Protected by The Fifth and Ninth Amendments

24. The Due Process Clause of the Fifth Amendment provides protection of unenumerated liberties against the federal government. The Ninth Amendment also provides protection under its express injunction that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX. To receive constitutional protection, an unenumerated liberty must have roots in "our Nation's history, legal traditions, and practices." Infringements upon fundamental liberties call for heightened scrutiny of the means by which Congress exercises its enumerated powers.

25. The rights to bodily integrity, to ameliorate pain, and to prolong life are closely related. They are distinct rights or specific aspects of the famous trinity of "life, liberty, and the pursuit of happiness" in the Declaration of Independence. These rights, with deep roots in our Nation's history, legal tradition and practice, permit decisions about one's body to be made free from governmental intervention. In the absence of a compelling interest that would be furthered by such a proscription, the government cannot, consistent with the Constitution, abridge these rights of Plaintiffs, who are seriously ill patients. No such compelling governmental interest exists.

26. The right to consult with one's doctor about one's medical condition is also a fundamental right deeply rooted in our history, legal traditions, and practices. Moreover, imperatives established by the sanctity of the physician-patient relationship prevent Defen-

dants' interference with Plaintiffs' ability to act on their doctors' treatment recommendations.

27. Plaintiffs herein are entitled to heightened protection against Defendants' interference with Plaintiffs' exercise of their fundamental rights and liberty interests. The Constitution does not allow Congress to authorize Defendants to deny or disparage the activities for which Plaintiffs seek protection herein.

The Medical Necessity Doctrine

28. The law in the Ninth Circuit specifically and expressly applies the medical necessity doctrine to those suffering patients who require medical cannabis. There is a class of people with serious medical conditions; for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for tile effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects. Although the Supreme Court has determined the doctrine is not available to a medical cannabis *distribution cooperative*, the applicability of the doctrine for seriously ill *patients* was not before the Court, and was notably preserved by the Court's concurrence in *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

29. Plaintiffs ANGEL and MONSON are seriously ill patients for whom there is no alternative means of avoiding starvation or extraordinary suffering without the benefits of medical cannabis. The medical necessity doctrine is available to these seriously ill patients to use

and obtain medical cannabis for their own personal medical treatment.

Credible Threat of Actual Harm

30. Plaintiffs' fears of being victimized by Defendants are not merely theoretical. Defendants are continuing, indeed in the past year have escalated, their attacks on medical cannabis patients protected by State law in California and other States. Since September 11, 2001, Defendants have terrorized more than 35 Californians because of medical cannabis, including many individuals patients for merely their own personal cannabis medication—involving amounts as small as one (1) cannabis plant or one (1) ounce of medicine. During that same period, nearly half of all the federal marijuana cases filed in the Northern District of California have involved medical cannabis. In a public speech on February 12, 2002, Defendant HUTCHINSON asserted that enforcement of federal laws against medical cannabis was a "responsibility" of his agency. HUTCHINSON reiterated that sentiment in a September 30, 2002, letter to California Attorney General Bill Lockyer, claiming the DEA is "legally mandated" to enforce such laws. With particular reference to Plaintiff MONSON's six medical cannabis plants, HUTCHINSON praised their seizure, claiming such action was Defendants' "duty under Federal law". Defendants' tactics commonly involve commando-style raids against sick patients in their homes, the pointing of high-powered automatic weapons at patients, and traumatizing patients and their loved ones. The Defendants frequently target those patients who are the most outspoken critics of federal policy. Being victimized by Defendants once provides no security for patients: The Defendants have raided several patients on more than

one occasion—always seizing medical cannabis, and sometimes initiating prosecutions or forfeiture actions against patients' property. Defendants' threats to medical cannabis patients are not confined to California, but extend as well to patients in various other States that permit medical cannabis. Plaintiffs reasonably fear further victimization by Defendants if the Court does not grant the relief sought herein.

FIRST CAUSE OF ACTION

31. Plaintiffs reallege and incorporate by reference Paragraphs I through 30 as if set forth fully herein.

32. The Commerce Clause, Article 1, Section 8, of the U.S. Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

33. Defendants' actions to raid, arrest, prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or administrative sanctions against any Plaintiff herein for intrastate noncommercial activities involving the personal medical cannabis of Plaintiffs ANGELS or MONSON would violate the Commerce Clause as applied to Plaintiffs.

SECOND CAUSE OF ACTION

34. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 30 as if set forth fully herein.

35. The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

36. Defendants' actions to raid, arrest, prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or administrative sanctions against any

Plaintiff herein for activities involving the personal medical cannabis of Plaintiffs ANGEL or MONSON would violate the Fifth Amendment as applied to Plaintiffs.

THIRD CAUSE OF ACTION

37. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 30 as if set forth fully herein.

38. The Ninth Amendment to the U.S. Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

39. Defendants' actions to raid, arrest, prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or administrative sanctions against any Plaintiff herein for activities involving the personal medical cannabis of Plaintiffs ANGEL or MONSON would violate the Ninth Amendment as applied to Plaintiffs.

FOURTH CAUSE OF ACTION

40. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 30 as if set forth fully herein.

41. The Tenth Amendment to the U.S. Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

42. Defendants' actions to raid, arrest, prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or administrative sanctions against any Plaintiff herein for activities within the State of California involving the personal medical cannabis of Plaintiffs

ANGEL or MONSON would violate the Tenth Amendment as applied to Plaintiffs.

FIFTH CAUSE OF ACTION

43. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 30 as if set forth fully herein.

44. Under the doctrine of medical necessity, individual patients who (1) suffer from a serious medical condition, (2) will suffer imminent harm without access to cannabis, (3) need cannabis for the treatment of their medical condition or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of their medical condition or symptoms associated with the medical condition because they have tried all other legal alternatives to cannabis and the alternatives have been ineffective or result in intolerable side effects, may use and obtain medical cannabis for their own personal medical treatment.

45. Plaintiff ANGEL suffers from numerous serious medical conditions, would suffer imminent harm without access to cannabis, needs cannabis for the treatment of her medical conditions and to alleviate symptoms associated with the medical conditions, and has tried all other reasonable legal alternatives to cannabis and found them to be ineffective or to result in intolerable side effects.

46. Plaintiff MONSON suffers from a serious medical condition, would suffer imminent harm without access to cannabis, needs cannabis for the treatment of her medical condition and to alleviate symptoms associated with the medical condition, and has tried all other reasonable legal alternatives to cannabis and found

them to be ineffective or to result in intolerable side effects.

47. The doctrine of medical necessity permits Plaintiffs ANGEL and MONSON to use and obtain cannabis for their personal medical treatment free from the threat of Defendants' actions to raid, arrest, prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or administrative sanctions against them.

IRREPARABLE HARM

48. Plaintiffs have suffered and will continue to suffer irreparable harm due to Defendant's challenged actions and practices described in this Complaint.

49. Plaintiffs face, or treat, serious or life-threatening medical conditions requiring therapy with cannabis to alleviate increased suffering, illness, or death. Defendants' interference with Plaintiff patients' treatment, and the resulting increased risk of suffering, illness, and death, constitute irreparable harm.

50. Plaintiff patients have constitutional rights to obtain treatment to alleviate their suffering. Defendants' actions are creating well-founded fear by Plaintiffs that Defendants will attack Plaintiffs' persons, medicine, health, or property, thus exacerbating Plaintiff patients' already serious medical conditions and constituting irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court enter judgment as follows:

A. Issue a Preliminary Injunction during the pendency of this action and a Permanent Injunction enjoining Defendants from arresting or prosecuting

Plaintiffs, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them for their activities with respect to any of the following:

(1) The possession of medical cannabis by Plaintiffs Angel McClary Raich and Diane Monson for their personal medical use;

(2) The ability of Plaintiff Angel McClary Raich to obtain medical cannabis from her Plaintiff caregivers, John Doe Number One and John Doe Number Two, for her personal medical use;

(3) The ability of Plaintiffs John Doe Number One and John Doe Number Two to cultivate and provide medical cannabis to Plaintiff Angel McClary Raich for her personal medical use;

(4) The processing of medical cannabis by Plaintiff Angel McClary Raich for her personal medical use; and

(5) The cultivation of medical cannabis by Plaintiff Diane Monson for her personal medical use.

B. Declare that enforcement of the Controlled Substances Act is unconstitutional to the extent it purports to prevent Plaintiffs from possessing, obtaining, manufacturing, or providing cannabis for Plaintiff patients' personal medical use.

C. Declare that the doctrine of Medical Necessity precludes enforcement of the Controlled Substances Act to the extent it purports to prevent ANGEL from possessing, obtaining, or manufacturing cannabis for her personal medical use.

D. Declare that the doctrine of Medical Necessity precludes enforcement of the Controlled Substances

Act to the extent it purports to prevent MONSON from possessing, obtaining, or manufacturing cannabis for her personal medical use.

E. Award Plaintiffs their reasonable attorneys' fees and costs.

F. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Dated: October 9, 2002

Respectfully submitted,

ROBERT A. RAICH
DAVID M. MICHAEL
RANDY E. BARNETT

By: /s/ ROBERT A. RAICH
ROBERT A. RAICH
Attorneys for Plaintiffs

APPENDIX

MEDICAL CONDITIONS OF PLAINTIFF ANGEL McCLARY RAICH

51. Plaintiffs incorporate by reference all paragraphs in this Appendix as if set forth fully in the body of this document.

52. *Life-Threatening Weight Loss, Malnutrition, Cachexia, and Starvation:* ANGEL experiences great difficulty maintaining a healthy weight. ANGEL's physicians, including her gastroenterologist, are unable to diagnose the root cause of her weight problems or to prescribe an effective course of treatment. One fact, however, is clear: ANGEL literally cannot eat without a sufficiently high level of cannabis in her system. Without cnnabis, ANGEL's weight can drop precipitously and she runs the very real risk of Malnutrition and Starvation. One result of Starvation is death. Death constitutes irreparable harm.

53. *Nausea:* ANGEL experiences chronic Nausea, which makes eating and drinking difficult, and exacerbates her wasting weight loss conditions. Even the smell, sight, or taste of food can trigger the nausea, and eating can cause stomach cramps leaving ANGEL in wrenching pain. Pharmaceutical anti-nausea medications are ineffective, but cannabis is the only medicine that provides relief.

54. *Severe Chronic Pain:* Every second that she is awake, ANGEL experiences Pain from one or more of the Chronic Pain conditions from which she suffers. She suffers greatly from Pain every single day. Sleep provides meager escape from the ever one word present Pain she experiences. Her pervasive Pain and

other conditions have made ANGEL permanently disabled. The prolonged Pain and suffering from her medical conditions significantly interferes with the quality of her life. Because ANGEL has an extremely high pain threshold, she is occasionally able to function when going about her life. On frequent occasions, however, the Pain becomes so great that ANGEL experiences difficulty performing everyday activities, or the Pain is so overpowering that she becomes completely debilitated and cannot get out of bed. When her nervous system becomes too overloaded with Pain, ANGEL experiences Muscle Spasms and Seizures. ANGEL's treatment is complicated by the fact that she is violently allergic to almost all pharmaceutical medicines. Cannabis, however, has the effect of making it easier for ANGEL to tolerate her constant Pain, although it does not make the Pain go away. Without cannabis, ANGEL's Pain would be torturous. On one occasion shortly before she discovered the benefits of cannabis, ANGEL's Pain levels were so high for such a prolonged period of time that, her body and soul racked with agony, ANGEL attempted suicide—as a desperate attempt at the only escape she could perceive from her torment.

A. ANGEL's numerous Pain conditions, as with all her medical conditions, exhibit a complicated interplay between each other, whose exacerbation presents the potential of a vicious spiral. Those Pain conditions include:

B. *Scoliosis*: ANGEL is plagued with abnormal curvatures and a rotation of the spine in her upper back and neck. She will be afflicted with Scoliosis until the day she dies. Scoliosis causes Chronic Pain in the vertebrae and muscles around her spine. The constant

Pain ANGEL experiences from Scoliosis also causes or exacerbates other medical conditions by affecting the musculoskeletal system of the arms, ribs, shoulder, clavicle, neck, and jaw. In addition, the painful site of a recent neck and back injury causes excruciating burning Pain in her vertebrae, nerve problems going down both arms, and difficulties with her thumbs. The injury also caused several of ANGEL's other Pain conditions to worsen. The resulting Pain has caused ANGEL to experience multiple episodes of Seizures and Muscle Spasms (which are painful in their own right) further exacerbating ANGEL's other Chronic Pain conditions and causing new and painful secondary injuries. Perhaps most critically, the injury caused ANGEL to get Fibromyalgia, a pain and fatigue disorder.

C. *Temporomandibular Joint Dysfunction Syndrome (TMJ):* TMJ combined with Bruxism causes pain, aching, throbbing, soreness, spasming, or cramps in ANGEL's face, gums, teeth, and jaw. This can make it difficult to talk, can make her jaw lock closed, can make eating difficult, and can cause headaches. Medical cannabis helps release ANGEL's cramps, relax her muscles, open her mouth, and cope with the Pain. Without medical cannabis, ANGEL's TMJ and Bruxism would spin out of control, worsening her Weight Loss conditions.

D. *Endometriosis:* Endometriosis causes ANGEL to experience disabling excruciating pain, and light headedness due to blood loss, during menstrual periods. ANGEL has undergone seven surgeries for Endometriosis. Immediately following her most recent surgery, ANGEL vaporized with cannabis in the hospital, amazing her doctors and nurses with how fast she recovered relative to patients who use narcotics after surgery.

E. *Headaches*: ANGEL experiences extremely Painful Headaches all over her head. ANGEL wakes up with Headaches nearly every morning. If they are too overpowering she must retreat to a dark quiet place. The muscles in her head and face can go into spasms, exacerbating the Headaches. Vaporizing or smoking cannabis helps ANGEL with Headaches that are not too bad, but the only medication that helps her with Severe Headaches is eating cannabis food.

F. *Rotator Cuff Syndrome*: A work-related injury in 1986 caused ANGEL to get Rotator Cuff Syndrome. Its Burning Pain has worsened over the years. She has difficulty doing repetitive tasks with her right arm, hand, shoulder, and shoulder blade. Overdoing them can cause her shoulder to freeze up and excruciating Burning Pain. Medical cannabis helps ANGEL cope with the Pain, and cannabis makes muscles, tendons, and ligaments around her shoulder joint more pliable, allowing her to use her arm.

G. *Uterine Fibroid Tumor*: ANGEL has a Fibroid Tumor within or on the uterine wall. This causes extremely heavy menstrual bleeding, making ANGEL light headed, dizzy, and nauseous to the point of almost passing out. The heavy bleeding and Painful menstrual periods can keep ANGEL down flat on her back for two or three days per month. Medical cannabis helps minimize ANGEL's pelvic Pain and helps release Spasms and Cramps, allowing her to function more easily.

H. Chronic Pain combined with the Paralysis that confined ANGEL to a wheelchair made her feel that she suffered indescribable torture in Hell. Only medical cannabis, characterized by ANGEL as a miracle sent to her from heaven, delivered ANGEL from the pits of that Hell. Without cannabis, ANGEL would endure the

excruciating torture of Severe Chronic Pain, and she might even again attempt suicide in an effort to escape. Pain, Torture, and Death constitute irreparable harm.

55. *Post Traumatic Stress Disorder P.T.S.D.)*: Years of molestation, physical, and mental abuse by family members created traumas that left ANGEL with Post Traumatic Stress Disorder. Escalated raids by the Defendants on medical cannabis patients since 2001 have exacerbated ANGEL's P.T.S.D. symptoms: She can find herself uncontrollably overwhelmed feeling suddenly in danger, and consumed with feelings of fear, helplessness, and horror. She reexperiences past traumas, has nightmares, and becomes overwhelmed with anxiety. She is becoming increasingly upset, gets angry and aggressive feelings, and fears that she must defend herself before the federal government breaks in her door, attacks her, incarcerates her, or kills her. She experiences sensations of panic and of trying to escape, yet she is too sick and her body is too weak. Medical cannabis helps keep ANGEL from living in the past, helps her deal with flashbacks, and helps her have courage to face her past abuse, her anger, her sadness, and her hurt. Cannabis allows ANGEL to cope with and manage her P.T.S.D. symptoms in a calm safe manner. Experiencing traumatic events (such as learning of new raids by federal agents on medical cannabis patients) can still trigger the P.T.S.D.

56. *Non-Epileptic Seizures:* When ANGEL has a Seizure, she loses awareness, has uncontrollable movements of her arms or legs, shakes all over, and falls to the ground. If she forces herself to go about daily life while having functioning problems, if she moves too fast, or if she becomes frightened for any reason, she can have Seizures. They are extremely

Painful, make all of her Pain conditions worse, and can trigger several of her other conditions. She may suffer for days at a time, having series of Seizures in combination with excruciatingly Painful body jerks, muscle spasms, and twitches. The use of medical cannabis minimizes those symptoms. Medicating with cannabis at the first onset of symptoms can prevent a seizure.

57. *Fibromyalgia:* Fibromyalgia is a condition characterized by multiple serious conditions. It causes ANGEL widespread chronic Pain in her muscles, ligaments, and tendons. Every muscle in her body can scream out Pain. The Pain can overload her body, putting her flat on her back for days. Fibromyalgia also causes extreme fatigue, totally draining ANGEL of energy, as though her arms and legs are tied to concrete blocks, and making it difficult to concentrate. Fibromyalgia further causes a sleep disorder inhibiting deep levels of sleep, as if ANGEL spends nights with one foot in sleep and the other one out of it. Other Fibromyalgia symptoms ANGEL experiences include Premenstrual Syndrome, Painful periods, chest Pain, severe morning Stiffness, Cognitive Functioning Problems, Numbing in her arms and legs, Tingling sensations, muscle Twitching, Skin Sensitivity, Dizziness, Impaired Coordination, losing her balance, and stumbling. Medical cannabis makes ANGEL's muscles, tendons, and ligaments more pliable, allowing her to move and go about her life with her family. It also helps her cope with the Chronic Pain and makes physical therapy more effective.

58. *Inoperable Brain Tumor:* ANGEL has a Meningioma or Schwannoma Brain Tumor. The Tumor is too deep for surgeons to remove it. In research suppressed by Defendants, researchers found that THC

(one component in medical cannabis) slowed the growth of Cancer in Mice. Later research (conducted outside the United States) confirmed that THC can destroy Brain Tumors in rats. ANGEL's doctors want her to continue medicating with cannabis in the hope that, among its other benefits, it will prevent her Brain Tumor from growing.

59. *Paralysis*: In September 1995, ANGEL suddenly lost the use of her right leg. By 1996, ANGEL was paralyzed on the right side of her body. For two years, her doctors could not diagnose the cause of her paralysis or prescribe an effective treatment. They said ANGEL would never walk again. In 1998, the use of high quality cannabis allowed sensation slowly to return to ANGEL's right side. Finally, in 1999 ANGEL regained use of her arm and leg and eventually learned to walk again in a difficult process made possible by cannabis.